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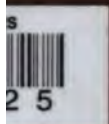
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THE LAW OF CONTRACTS.

A TEXT-BOOK FOR TECHNICAL SCHOOLS

OF

ENGINEERING AND ARCHITECTURE

BY

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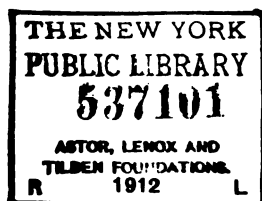
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PREFACE.

ALL business is conducted through the medium of contracts, and whether it be the ordinary affairs of domestic life by means of simple parol agreements, or the erection and completion of great public works by carefully prepared specialties, the same law applies to, and the same principles govern, both. Without the medium of contracts the world's business would be at a standstill, and no man can do business successfully without some knowledge of the law governing contracts.

Every day, as competition increases, this is becoming more apparent, and every day it is brought more forcibly to the attention of the schools, both general and technical, until now many of the universities and technical schools offer to their students courses in general business law, consisting chiefly of the law of contracts.

This book has been published in response to a request from several of the larger and more progressive industrial schools of the continent for a text-book on the Law of Contracts. The necessity of such a book in the industrial professions arises from the universal practice of engineers and architects to prepare the contracts and specifications for public and private works. The preparation of the specifications is the proper and legitimate undertaking of the engineer or architect, and the contract, which embodies and makes operative the specifications and plans, must be drawn with reference to them, to give to them the force and effect required. If the specifications be drawn by the engineer or architect, and the contract be prepared by an attorney, conflict often results between the two instruments, creating ambiguity and litigation. Between the two evils, the lack of law and the want of technical knowledge, the former is regarded as the lesser, and the preparation of both the specifications and the contract has been, and is, intrusted to engineers and architects.

A study of the statistics of public and private work shows that more than one half the contracts are prepared by engineers or architects without consultation with the legal profession. This is unfortunate, not only for the parties having the work done, but for the contractor undertaking it. A contract prepared without regard to legal principles is pretty certain to lead to litigation, either from misunderstanding or misinformation as to the legal rights and liabilities of the parties, or from a failure to create a valid and binding

contract as the parties intended. As this practice is the result of the conditions which prevail in most instances where public and private work is undertaken and prosecuted, it has not been and will not be corrected by advice to the parties, or to their engineers, that they should not perform functions which are the proper work of a lawyer. It is hoped to remedy the evil consequences of such a practice, in a measure at least, by placing before engineering and architectural students a treatise upon the law of contracts, and particularly of those contracts pertaining to construction work, and the employment of engineers and architects.

The chapters here presented are the substance of a course of lectures delivered by the author some years ago before the technical classes in engineering and architecture at Harvard University, and which were received with so much favor as to encourage the author to publish them. This was first done in his book on "Engineering and Architectural Jurisprudence," wherein they were embodied together with other material subsequently collected and bearing upon the same subject. That work is more comprehensive than is required for a text-book. It would require more time to cover it than the average technical school can spare from the very full course of study prescribed, and so this abridged edition has been issued.

The present volume contains the essential principles upon which valid contracts depend and the main features of the statutes which modify and limit the obligations of contracts, and also, in a fairly complete and concise form, the law of bidding and letting.

The part devoted to engineers' and architects' employment should be of much interest and practical benefit to students who contemplate a professional life, or a business career in which they may become employers. The chapters therein contained will cultivate in young men a realization of the obligations assumed and of the duties imposed by employment, whether as mere employee, or as professional man, or as public officer.

A study of the chapter on the employee's rights in his designs and inventions will safeguard the productions of their creative genius, and will save them chagrin from having heedlessly or ignorantly bartered away the fruits of their labor and technical training. If in after-years they be engaged as expert witnesses, they will find the chapter on the employment of expert witnesses of much value. Every young man in the technical professions is quite certain to be called, sooner or later, to act as an expert witness, and he should accept such a call without some advice or reading to assist him in the preparation of the case to the court and the jury, and to guide him in his conduct before them.

The book does not perhaps present anything new so far as it describes and explains the elementary principles upon which the law of contracts is based, but the author claims for it so much novelty as is contained in a book of new material and of instances peculiar to the engineering and architectural professions.

professions. Almost all of the illustrations used and the cases cited as authorities are those that have arisen in engineering and architectural work, and which have had in them serious lessons either for the owner or for the contractor or builder concerned in them. These instances add to the subject-matter and give to the student much information belonging strictly to engineering and architecture which cannot be obtained from any other source.

The favor with which the author's "Engineering and Architectural Jurisprudence" has been received relieves him from anxiety for the present publication; except that students who purchase this text-book edition will, when they enter professional practice, find it incomplete. If the difference in the cost of the two books be not a matter of much importance to the student, he is recommended to purchase in the first instance the complete work on "Engineering and Architectural Jurisprudence."

From his own experience the author is enabled to speak thus confidently of the value and interest that the book should have for the student of engineering and architecture. At the beginning of his professional career as an engineer he felt the lack of the information it contains and came to know full well the tribulations and trials which young men will meet. As a teacher and lecturer he knows the interest which the subject has for students; and as an officer of a great city (having in hand the contracts for its public improvements) he realizes the value to engineers and architects of some knowledge of Contract Law as illustrated in the contract forms and specifications submitted to him by technical men, some with, and others without, such knowledge.

To the student the author would say a word in regard to the study of contract law, which perhaps will apply to the study of any subject, viz., that the closest attention should be given to the fundamental principles or essential elements. It should not only be the first step in the drafting and preparation of the contract, but it should be the last consideration before the final copy is executed. A final revision of the whole instrument prepared should always be made to see if it contain the elements of a valid and binding contract, and that it is within the statutes limiting and modifying the law of contracts. It is surprising what a number of contracts, prepared and passed even by lawyers, are declared invalid and of no binding effect because they lack one or more of the four essential elements requisite to the validity of a binding contract. Do not, above all things, be hurried in the preparation and execution of a contract and the specifications of a work.

The book is designed to cultivate in young members of the industrial professions a proper understanding and appreciation of business and business relations. Graduates of technical schools often obtain a contracted view of their professional duties and labors. There is danger of narrowing their work to the ministerial duties of the drafting-room, the shop, or the field. Many men technically trained or educated remain in the shop or the drafting-room,

while less skillful men, who have acquired a business experience, become superintendents, managers, and presidents of the companies employing them, and frequently they are more justly entitled to promotion to such offices. A technical education prepares a man for a higher sphere than that of machinist, designer, or surveyor. Supplemented with a good business training, it fits a man for the direction and superintendence of large works. Technical students should enter a broader field of action, by acquiring a better appreciation of business relations and business principles, and a due sense of their duties, liabilities, and responsibilities.

There is no business for which the training of an engineer better fits him or that is likely to prove more profitable and satisfactory than that of a contractor and builder. A young man who starts out in his professional career with a fair knowledge of the law of contracts is certain to show an interest in business methods and principles. If he will cultivate such an interest and make observations and memoranda of the cost of labor, materials, and equipment, he will soon have data which, together with those qualifications previously acquired by every engineer, viz., the capacity to estimate, design, and erect works, will give him all that is required to undertake construction work and to become a successful contractor.

It is the author's hope that by the publication of this work he has contributed something that shall cultivate in technical students an interest in such business relations as are created and fixed by contracts. If that be accomplished, he will feel that he has conferred a personal benefit upon the student and a universal and lasting service to the technical professions.

220 BROADWAY, CITY OF NEW YORK.

January 30, 1901.

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ENGINEERING AND ARCHITECTURAL JURISPRUDENCE.

PART I.

LAW OF CONTRACTS IN GENERAL.

CHAPTER I.

LAW OF CONTRACTS IN GENERAL.

ESSENTIAL ELEMENTS OF A CONTRACT. LEGAL AND ILLEGAL CONTRACTS.
THE PARTIES TO A CONTRACT.

1. **Introduction.**—Engineering and architectural construction is rarely undertaken by the owners or proprietors of the structure. Works of magnitude or importance require the services of engineers, architects, and skilled mechanics who have had practical experience. Structures are not erected by the parties who own them and are to control them, but by parties who have no interest in them except what they assume for hire, or the profit that they can make out of the job. The relations created are those of an employé or of an independent contractor, and whichever rôle is assumed, they are relations and obligations growing out of an agreement or understanding called a contract. All work of importance is the subject of a contract, and it is manifest at the beginning, that a clear understanding of the legal status of the parties engaged upon construction will require some knowledge of the law of contracts. The reader is first introduced, therefore, to the principles underlying the law of contracts.

To assume contract obligations, the law requires that the parties shall observe certain formalities and that their intentions shall be evidenced by overt acts, which may be made a matter of record. Part of the requirements are fundamental principles of the English common law, some are the effect of statutory limitations, while others are the result of court procedure, and not a few rest upon that broad, yet vague, ground of "public policy."

2. **Essential Elements of a Contract.**—Every binding contract must contain four essential elements, viz.: 1. Two parties with capacity to contract.
2. A lawful consideration: a something in exchange for its legal equivalent.

a *quid pro quo*. 3. A lawful subject-matter, whether it be a promise, an act, or a material object. 4. Mutuality: a mutual assent, a mutual understanding, and a meeting of the minds of the parties.' These elements of a simple contract are of the foundation of the English common law, and no agreement, so called, is a binding contract unless it embodies each and all of these essentials. Without them our courts decline to recognize the binding effect of the agreement and the parties are free to fulfil their obligations or not at their pleasure.*

The order in which these elements are given was adopted because it seems the safest and most rational treatment of the subject of contracts. A contract requires that there shall be, first, two competent parties; secondly, a lawful consideration; thirdly, a lawful subject-matter; and lastly, a meeting of the minds of the parties with regard to the parties, the subject-matter, and the consideration. If these essentials were considered in the order given, there would be fewer cases of hardships and less litigation over contract rights. The mischief frequently results from the parties mutually consenting to be bound and exchanging the considerations before the questions of competency of the parties and the legality of the act undertaken have been considered. The order adopted is that usually followed in written contracts. The author has followed, as closely as a liberal treatment would seem to permit, the lines of an engineering and architectural construction contract, and throughout, so far as possible, he has cited cases that have arisen under such contracts.

3. The Introduction to a Contract.—Contracts are generally begun by introductory clauses peculiar to the law, though no special form is required. The forms employed are as various and eccentric as the persons who frame them; but of them all, it is submitted that either of the following forms will answer in any contract for construction work:

[Heading.]

"THIS AGREEMENT, made and entered into [concluded] this day of.....in the year by and between.....etc., etc.,"

is a concise and direct introduction, and it is the most common form used in all contracts.

"[THESE] ARTICLES OF AGREEMENT, made and entered into between.....of.....and.....of.. on this.....day of....."—

is a good and popular clause. These are mere forms, and their selection a mere matter of taste with the draftsmen.

* If the contract be a written instrument it must be delivered. *Leonard v. Kebler's Adm'r* (Ohio Sup.), 34 N. E. Rep. 659.

* A finding that a written contract was

void is equivalent to finding that there is no written contract at all. *Rebman San Gabriel Val. Land & Water Co.* (Cal. 80 Pac. Rep. 564.

4. Designation of the Parties.—

—“by and between..... (name of owner, company, board, city, university, or other corporation)....., of the City of [Town of]....., County of....., State of....., party of the first part, and..... (name of contractor or company) of the City of....., County of....., State of....., party of the second part.”

The parties of a contract are designated as *party of the first part* and *party of the second part*, the former being conventionally applied to the person who contracts to sell, to lease, or to have performed the subject-matter of the contract, and the latter title to the person agreeing to take or purchase the article or to perform the contract. These terms are frequently avoided by using instead the names of the parties, referring to them as the *laid*....., the *Said Contractor*, the *Said Owner*, the *Said Board*, *City*, *Company*, *University*, etc. This avoids confusion and the danger of the parties forgetting to which party he or they belong. A man will hardly fail to recognize his own name or that he is a contractor, when he might not remember that he is the party of the second part. When reference is made to the parties as the *City*, *Board*, *Company*, etc., or as the *Contractor* or the *Engineer*, it is customary and prudent to insert a clause explaining who is intended and included within the terms, as in the following clauses:

“That whenever and wherever in this contract the phrase ‘party of the second part,’ or the word ‘Contractor,’ or a pronoun in place of either of them is used, the same shall be taken and deemed to mean and intend the party of the second part to this agreement (his [their] heirs, executors, administrators, or assigns).”

“That whenever the word ‘Engineer’ is used in these specifications, or in this contract, it refers to and designates the Chief Engineer of the owner, company, or city for the time being, acting either directly or through the Deputy Chief Engineer or any Assistant or Division Engineer having general charge of the work, or through any Assistant or any Inspector having immediate charge of a portion thereof, limited by the particular duties entrusted to him.

“That whenever the word ‘Owner,’ ‘Company,’ or ‘City’ is used in these specifications, or in this contract, it refers to and designates the parties of the first part to this agreement (his [their] heirs, executors, administrators or assigns) (or its successors or assigns).”

AS REGARDS THE PARTIES.

5. Parties to the Contract.—There must be *two* parties to every contract, the one who is bound to perform the contract and the other who is entitled to have it performed.¹ A person cannot contract with him-

¹ A contract may be made to pay some unknown party to be ascertained a some future time upon a contingent event. Notes payable to bearer, or to an indorser, may be mentioned as such contracts,

though by the law of merchants' bills and notes are placed upon a footing peculiar to themselves. An advertisement offering a reward is an offer only, and is not a contract until accepted by the person who per-

self;' and a promise to pay money to oneself is not a promissory note.' One and the same person cannot be party to a contract on both sides; such an instrument can create no liability or right to a contract. Companies are sometimes formed into departments and their accounts kept separate and distinct, but such departments cannot enter into agreement between themselves, nor assume obligations that can be enforced. The departments must each be independently incorporated and have a separate existence.' The same person cannot be party to both sides, although other parties are joined with him on one side or the other; and an agreement in such a form creates no legal right or liability. The reason of this is that it is impossible for a man to sue himself.' Notes or contracts made by several, jointly or severally, cannot, however, be avoided for this reason.' For the same reason it has been held that a partner cannot contract with his firm, and that two firms having a common partner could not incur liability by contract.' It has been held (1824) that the engineer of a bridge who was a shareholder in a bridge firm could not maintain an action against his firm, being himself a partner.' The tendency to-day is to regard a partnership in the same light as a corporation, to treat it as an entity, an artificial body independent of the partners who comprise it. On this theory it has been held that firms having a common partner can sue each other in equity or in those states where the code is established.' Agreements between partners have been allowed in equity as matters of account in settling affairs of the partnership.' It is hardly necessary to say that one company may contract with another even though there are directors in one that hold a like office in the other; the company or corporation being regarded as a creation of itself, independent of the persons who represent it.

6. Only Parties to Contract are Bound.—Generally speaking, the legal effect of a contract is restricted to the parties and no right or liability can result to a person who is not a party.' When a contract is made with two or more persons for some act to be done or payment to be made to one of them only, the right to have it done or paid accrues to all the persons, who must all join in suing upon it, although only one is to have the benefit.'

7. Legal Representatives of the Parties.—In drafting construction contracts it is usual to provide for the death or incompetence of either party by making the party's heirs, executors, administrators, or assigns of a person, or the successors and assigns of a corporation, parties to the contract, after the following manner:

forms the services for which the reward is offered.

¹³ Wall. 78, 36 Fed. Rep. 218.

¹ Commonwealth v. Dallinger, 118 Mass. 489; other cases in Ames' Cases on Bills and Notes 188.

² Grey v. Ellison, 1 Giff. 498.

⁴ Leake's Digest of Contracts 440.

⁵ Money Penny v. Hartland, 1 Ca Payne 353.

⁶ Ames' Cases on Partnership, chap.

⁷ Leake's Digest of Contracts 440.

⁸ 3 Amer. & Eng. Ency. Law 863.

⁹ Leake's Digest of Contracts 442.

"The said Party of the Second Part [the said . . . , or the said Builder, or the said Contractor] does hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said Party of the First Part [the said . . . , or the said owner, company, or city], his (their) executors, administrators, or assigns [or its successors and assigns], that he, the said . . . , his (their) executors, administrators, etc., shall or will, for the considerations hereinafter mentioned, etc., erect, build, etc."¹

In case of death or assignment these parties, who may be called secondary parties, become the representatives of the principal party and take his place, so far as is possible.

8. The Representatives after Death, or Changes Effected by Law.—Executors and administrators are the personal representatives of a party as to his personal estate after his death. The right to enforce certain contracts of the party whom they represent has been recognized from the earliest times.² This right belongs exclusively to the executor, or administrator, or successors, and it cannot be transferred to other parties by words introduced into the body of the contract. The personal representative may maintain an action to recover money payable to the person he represents, though the contract failed to make the money payable to his executor or administrator. If the contract made it payable to the contractor or his assigns, or to his heirs or executors, the personal representative may recover without even averring that the money has not already been paid to the heirs.³ So, too, the personal representative is liable on the contract, although not named in the terms.⁴ The executor or administrator has been held liable even when the heirs were named and the executors were not.⁵ If a house is to be completed before a certain time, the contractor's executor or administrator is bound to perform the contract, or to enforce its performance on the part of the owner. The heir cannot enforce its performance even if the profits are partly in lands.⁶ In the interests of the estate the personal representative may rescind the contract of his decedent, with the consent of the company or other party.⁷ It is a presumption of law that parties to a simple contract intend to bind not only themselves but their personal representatives.⁸

9. Executor or Administrator Takes Benefits and Burdens of Contract.—An executor becomes entitled to the benefit of the contracts of a deceased contractor for the supply of materials, or for the execution of works remaining incomplete at his death that do not involve the personal skill and ability of the contractor; and he is entitled as executor to complete the

¹ The representative may be mentioned as in the form given in Sec. 4, page 3, which is simpler in that it avoids the constant repetition of the words "heirs, executors, administrator, or assigns" in the text of the contract.

² Pollock on Contracts 206.

³ 7 Amer. & Eng. Ency. Law 262.

⁴ 7 Amer. & Eng. Ency. Law 326.

⁵ 7 Amer. & Eng. Ency. Law 327.

⁶ *Crans v. Kans. Pac. R. Co.*, 131 U. S. clxviii (1879).

⁷ 7 Amer. & Eng. Ency. Law 327.

⁸ 2 Parsons on Contracts (6th ed.) 530.

works, and to recover their value for the benefit of the contractor's estate. In the case of an ordinary building contract undertaken and commenced by the deceased builder, the executor may complete it and recover the price in his representative character.¹ A contract to build a lighthouse was held to be discharged by the death of the contractor, on the ground of its being a matter of personal skill and science.²

10. Contracts for Personal Skill of Contractor.—Whether or not the executor or administrator of an estate can carry out and receive the benefits of the contractor's contracts depends upon the character of the work. It may well be doubted that the representative of a physician, lawyer, or engineer would be allowed to step into the shoes of the deceased. A contractor or builder may have acquired a reputation in the construction of a particular kind or class of work, in which his personal skill and proficiency are the important consideration in employing him. If this can be proved, then the contract cannot be performed by the executor, administrator, or the assignee.³ If the contract is not founded upon personal relations, or does not require personal skill, it survives to the executor or administrator, and the estate may be held liable for a breach committed after as well as before the death of the contractor.⁴ It has been held in New York State that a contract to do certain repairs on a building for a specific sum is not a personal contract, which is terminated by the death of the owner, but the contractor can recover of the administrator for work done thereunder after the death of the owner, though the owner devised the property and the devisee directed the contractor to continue the work. Ordinary contracts for engineering and architectural work pass to the contractor's legal representatives, who take the burdens as well as the benefits.⁵ A coat ordered of a tailor, who began to make it and died before completion, was completed and delivered by his administrator, who recovered the price in his representative character.⁶

11. Executor Named in Contract.—It is not necessary that the executor or administrator be named in terms; if the contract be of such a character that it survives, the personal representative of the contractor is liable upon it.⁷ If the executor be named, it is evidence that the parties did not consider the contractor's services as personal. If the contract is between a city

Stellman v. Northup, 109 N. Y. 473; *Pollock on Contracts* 206; 126 N. Y. 45.

¹ *Leake's Digest of the Law of Contracts*, 1254.

² *Wentworth v. Cock*, 10 A. & E. 45.

³ *Robinson v. Davidson*, L. R. 6 Exch. 269; and see *Lloyd's Law of Building*, § 12.

⁴ *Cooper v. Jarman*, L. R. 3 Eq. 98; 7 *Amer. & Eng. Ency. of Law* 826.

⁵ *Russell v. Buckhout* (Sup.), 84 N. Y. Supp. 271, *Dykman, J., dissenting*.

⁶ *Wentworth v. Cock*, 10 A. & E. 45;

Siboni v. Kirkman, 1 M. & W. 418.

As to what contracts will be considered personal, see Robinson v. Davidson, L. R. 6 Exch. 269, 274; *Cooper v. Jarman*, L. R. 3 Eq. Cas. 98; *Dickinson v. Callahan*, 2 Pa. St. 227.

The contract of an author to write a book is discharged by his death. *Marshall v. Broadhurst* (Eng.), 1 C. & J. 408.

⁷ *Werner v. Humphreys*, 2 M. & G. 1.

⁸ *Quick v. Ludburrow*, 3 Bulstr. 3; *Amer. & Eng. Ency. Law* 336.

* See Sec. 12, *infra*.

a corporation, "its successors and assigns," for erecting waterworks furnishing water to the city, it is assignable by the corporation.' If a contract for himself and his executors to build a structure and die, executors must go on or they will be liable for damages for not completing the work. If they do go on, they may recover as executors and the money when recovered will be assets in their hands.² Hence the advisability of a contractor's making his executor or administrator a party to his contract.³ Contracts founded on personal qualifications, as skill, ability, or integrity, such as the employment of an agent, a servant, an artist, an actor, an architect, and an engineer, terminate with the death of the employer or employee in the absence of express stipulation.⁴

A contract for the employment of an agent by a partnership is dissolved by the death of one of the partners.⁵ Therefore the legal representatives cannot enforce such agreements; and frequently, if the contract is for a completed structure or piece of work, the representatives cannot recover for the services performed.

2. Executor's Liability on Contracts and for Torts of Party.—An executor or administrator has power to complete a contract made by the person he represents, but he cannot by virtue of the general powers of his office complete contracts which shall bind the decedent's estate. The effect of such contracts is to bind the representative.⁶ For goods or materials purchased for the benefit of the estate he incurs a personal liability.⁷ This would not be true probably of materials purchased in the execution of a building contract of decedent, as executor or administrator.

At common law no action could be brought against the executor or

Marble L. W. & P. Co. v. City of New York (111. Sup.), 29 N. E. Rep. 556.

Marshall v. Broadhurst, 1 C. & J. 403. It may be asked why the word "heir" is employed, as if it were possible for a testator to bind his heirs to perform covenants to build, or to assume contractual obligations, since the courts have held that the executor is the one who is liable for the debts of the decedent, and that he should be mentioned in the contract.

By the common law contractual obligations went to the executor and administrator on death of the contractor, with all real and personal property, choses in action, etc. Estates in fee simple were liable in the hands of the heir only, for debts by specialty in which the heir was named. 4 Cases on Real Property 642. It was necessary that the heir should be named in the contract, and that it should be under seal, if the owner or company had no other assets. Heirs have no claims on the real estate; but it is probable that it became the duty of the executor to draw construction contracts as liabilities. In the United States generally, a man's property, real and personal, is liable for his debts, and the distinction

between real and personal assets is not so marked in considering contractual obligations. 4 Gray's Cases on Real Property 643. There is little use of the word, but it is and will be used, for lawyers are slow to make changes in old and established forms. Like the expression "work and labor" in the common counts, it is used because others have used it, but it would be difficult to distinguish between work and labor. To be safe and avoid unforeseen complications both the words are used, and it is recommended that the word "heirs" be inserted, as it is good usage. The reader may reasonably exclaim, What a blessing it would be if some profound scholar of law would come forward and explain away the abundance of meaningless words that pervade legal documents, and expunge the surplusage imposed by ancient laws and practice that still pervades our legal instruments!

² 7 Amer. & Eng. Ency. Law 262 and 326.

³ 7 Amer. & Eng. Ency. Law 326.

⁴ 7 Amer. & Eng. Ency. Law 299.

administrator for a tort committed by the deceased person whom he might represent. The word "tort" includes acts of trespass, trover, false imprisonment, assault and battery, slander, deceit, etc. Under that law it has been held that a complaint alleging that a contractor was prevented by owner from performing work under his contract and asking damages resulting from the loss of profits which he expected to make was an action in tort, which did not survive the death of the owner.¹ It has been held that if by reason of a tort the estate of the deceased person has derived pecuniary profits, that the representative could be compelled to account to the party injured.²

13. Assignee of Contractor or Owner.—The word "*assigns*" is in common use and is a desirable, though perhaps not a necessary word. It should be omitted if the contract is a contract for personal skill or if it contains a clause forbidding an assignment, as it tends to show a contrary intention. An assignee would probably be bound without being named in the contract, or at least he could take no benefit without assuming the burdens.³ An assignment of a contract in express violation of a positive prohibition is void, and the party claiming through such an assignment is entitled to no relief in equity.⁴

Contracts for the performance of personal duties or services are not assignable so as to confer the right upon the owner to command the services or to compel him to accept performance by the assignee. One who has contracted to perform work which requires skill and science cannot impose another in his place without consent of the other party.⁵ If the contract is given to the contractor because of his peculiar proficiency and skill in executing the work required to be done, then it can be assigned only by consent of the parties to the contract, which may be properly established by facts and circumstances showing his assent. Evidence tending to show such assent is admissible.⁶

A contract for the erection of a lighthouse has been held one for personal services which could not be completed by the representatives of the contractor.⁷

The introduction of the word *assigns* in the instrument may be evidence that the parties anticipated the possibility if not the probability of its assignment, and it is therefore sometimes omitted rather than to raise such a presumption. Thus an agreement or promise to a company, its assigns or successors, will enable the assigns and successors to complete works started by the company, and to enforce promises made to it, when the execution of the work is the essence of the agreement.⁸

¹ Jenkins v. Bennett (S. C.), 18 S. E. Rep. 929.

² 7 Amer. & Eng. Ency. Law 333.

³ 29 Amer. & Eng. Ency. Law 978.

⁴ Griggs v. Landis, 19 N. J. Eq. 350 [1868].

⁵ 1 Amer. & Eng. Ency. Law 832; Munsell v. Temple, 3 Gillman 93; Lansden v.

McCarty, 45 Mo. 106; Bethlehem v. Arms, 40 N. H. 34; Haskell v. Blair, 3 Cush. (Mass.) 534.

⁶ Crawford v. Wolf, 29 Iowa 567 [1871].

⁷ Wentworth v. Cock, 10 A. & E. 45.

⁸ Michigan M. & C. R. Co. v. Bacor Mich. 446 [1876].

14. What Contracts and Claims are Assignable.—Construction contracts are in general assignable, if there be no clause contained expressly forbidding an assignment, and if the statute authorizing the work does not prohibit it, and such an assignment is valid. Any executory contract, not necessarily personal in its character, and which is consistent with the rights and interests of the adverse party, may be as fairly and sufficiently executed by the assignee as by the original contractor, if the contractor has not disqualified himself from its performance.¹ A contract to do work on a street can therefore be assigned, and if the assignee fulfills the conditions of the contract he can enforce it and recover the contract price.² The assignment of a contract for cleaning streets is not against public policy so long as the city retains the personal obligation of the original contractor and his sureties,³ and an assignee can maintain an action in equity for a division of the profits of a building contract if he has performed his undertakings.⁴ A contract to put on a gravel roof, to be done in first-class shape and guaranteed for a certain time,⁵ and a contract to drill an oil-well,⁶ have been held such contracts as might be sublet or assigned, when it was not shown that the contractor was specially fitted to do the work and was employed on account of his knowledge, experience, or pecuniary ability.

15. Contracts Awarded to Lowest Bidder may be Assigned.—Contracts awarded to the lowest bidder after advertising for proposals are not of a personal character, requiring rare genius or extraordinary skill, but may be assigned. The public are invited to bid for and take these contracts regardless of professions, trades, or occupations. Aside from the discretion usually vested in the board to reject all bids when they deem it for the public good, or the bid of any party who may have proved delinquent or unfaithful in any previous contract, there is no restriction upon the capacity of the contractor. He is not expected or required to do the work in person. Whether he knows anything about the work, or can tell the difference between a mud turnpike and a Nicholson pavement, or whether a sewer should be constructed in the shape of a longitudinal section of an egg-shell, or which end of the section should be uppermost, is of no consequence, for the contract is not awarded him because of his superior knowledge or skill, but because his bid is the lowest and his bond for the performance of the work in a workmanlike manner and according to the specifications is good. Moreover, by the terms of the contract, the work is to be performed under the direction and to the satisfaction of the engineer; it is *his* skill and genius therefore which gives form and excellence to the work, and it is there-

¹ *Bates v. Lumber Co.* (Minn.), 57 N. W. Rep. 218, 29 Amer. & Eng. Ency. Law 778, and cases cited.

² *Taylor v. Palmer*, 31 Cal. 241.

³ *Devlin v. Mavor et al.*, 63 N. Y. 8 [1875]; and see *Little v. City of Portland Ore.*, 37 Pac. Rep. 911.

⁴ *Dougherty v. Grouff* (Neb.), 36 N. W. Rep. 351, [1888].

⁵ *Curran v. Clifford* (Colo. App.), 40 Pac. Rep. 477.

⁶ *Galey v. Mellon* (Pa. Sup.), 33 Atl. Rep. 560.

fore in his genius and skill, if anywhere, that trust and confidence are reposed.¹ *

In New York State everything that could be transmitted to the assignor's personal representatives is assignable. The test is, whether or not the thing assigned would pass to the executors and administrators of the assignor at his death.²

16. What Interest does an Assignee Take.—Where the assignees of a contract to construct a railroad agree to save the assignor harmless from all liability by reason of subcontracts previously let by him, a failure to pay the amounts due on such subcontracts is a breach by the assignees for which the assignor can recover without first showing payment by himself.³

An assignment of money due and to become due on a building contract effects an immediate and present transfer to the assignee of a right to demand and receive the money assigned without notice to the debtor.⁴

To complete the assignment notice should always be given the debtor to establish priority of claims of the assignee over those of materialman, other assignees, and creditors. Until informed of the assignment the debtor may regard the contractor or assignor as the creditor and may pay him and accept a release, or settle the claim with him, or purchase a debt which he owes and use it as set-off.⁵

When a contractor assigns his contract with a city to build a structure it seems there is no implied warranty on his part of its validity, and if it turns out to be invalid and worthless the assignee cannot avoid the payment of notes he has given in consideration of such assignment, there being no misrepresentation, concealment, or fraud on the part of the contractor.⁶

The cases are common where contractors have assigned to subcontractors,⁷ and the latter may maintain an action on such assignment, but subject to defenses existing against the assignor or principal contractor. Moneys not yet earned, but expected to be earned in the future under an existing contract, may be assigned,⁸ as can the lien of a mechanic or materialman,⁹ but the lien must have been perfected first. An assignment of claims for work done or materials furnished was held to give no right to the assignee to a lien.¹⁰ The assignment by a subcontractor of his account for work performed

¹ *Emery v. Bradford*, 29 Cal. 75; *Taylor v. Palmer*, 31 Cal. 240 [1886].

² 1 Amer. & Eng. Ency. Law 832.

³ *Mills v. Allen*, 10 Sup. Ct. Rep. 413.

⁴ *Board of Education v. Duquesnet* (N. J. Ch.), 24 Atl. Rep. 922; *Union Pac. Ry. Co. v. Douglas Co. Bank* (Neb.), 60 N. W. Rep. 886.

⁵ 1 Amer. & Eng. Ency. Law 840.

For a case where notice was given in English to one who could not read English, see *Renton v. Monnier*, 77 Cal. 449.

⁶ *Gould v. Bourgeois*, 51 N. J. Law 361

[1889]; but see *Humphreys v. Jones*, 1 Exch. 952.

⁷ *Chambers v. Lancaster* (Sup.), 38 N. Y. Supp. 253; *Dirimple v. State Bank* (Wb.), 65 N. W. Rep. 501.

⁸ *Perkins v. Butler Co.* (Neb.), 62 N. W. Rep. 308; *Tracy v. Waters* (Mass.), 30 E. Rep. 190.

⁹ *Milwaukee Mechanics Ins. Co. v. Brown* (Kans. App.), 44 Pac. Rep. 8.

¹⁰ *Jenckes v. Jenckes* (Ind. Sup.), 1 E. Rep. 632.

as collateral security does not defeat his right to perfect a mechanic's lien therefor.¹

17. Third Parties, Strangers, and Beneficiaries.—Persons not parties to a contract may subsequently acquire rights under it by assignment and operation of law, as the right of administrators, receivers, and successors in office, but, as a general rule, strangers can not sue on a contract. If the contract, not under seal, be made for the benefit of a third party, it has been repeatedly held that the third party can bring an action to recover what he is fairly entitled to under the contract. Evidence may be introduced to show that a written contract was made in behalf of parties other than those named, and to charge such other persons.² A third person, who is only indirectly or incidentally benefited by the contract, will not be allowed to sue upon it. For example, a stipulation in an engineering contract, by which the contractor is to indemnify the owner for damages, does not give to a party injured a cause of action against the contractor.³ A provision in a contract that a city may retain money until the contractors shall have paid his laborers, does not give the laborers any rights against the city when the contractor has been paid in full.⁴

A provision that the owner shall retain a certain percentage of the contract price till the completion of the work is for the benefit of the owner, and does not afford a ground of personal liability by the owner to subcontractors.⁵

The third party cannot sue on the contract, unless it is perfectly clear that both parties to the contract intended it for his benefit. The mere fact that the third party might be benefited is insufficient.⁶ It has been held, however, that a bond to a city by contractors, providing that they will pay for all labor and materials furnished, is a promise for the benefit of all persons furnishing labor and materials, and such persons may sue on it,⁷ especially when the city or county is required by statute to secure its laborers and material men by a bond that the contractor will pay them.⁸ If the bond be to pay for all materials furnished, the contractor is not liable either under his contract or on the bond to creditors of subcontractors for materials furnished, and the contractor's assignee is no more liable.⁹ It has frequently

¹ *Ittner v. Hughes* (Mo. Sup.), 34 S. W. Rep. 1110.

² *Ropes v. Arnold*, 30 N. Y. Supp. 997.

³ *French v. Vix* (N. Y. App.), 37 N. E. Rep. 612.

⁴ *Old Dom. Gran. Co. v. District of Columbia*, 20 Ct. of Claims 127; *Sayre Lumb. Co. v. Union Bank* (Colo. App.), 41 Pac. Rep. 844; *Lawrence v. United States* (Ct.), 71 Fed. Rep. 228.

⁵ *Steele v. McBurney* (Iowa), 65 N. W. Rep. 332; *Weller v. Goble*, 66 Iowa 113.

⁶ *Wright v. Terry* (Fla.), 2 So. Rep. 61887.

⁷ *Lyman v. Lincoln* (Neb.), 57 N. W. Rep. 531; *Kauffman v. Cooper* (Neb.), 65 N. W. Rep. 796; *St. Louis v. Von Puhl* (Mo.), 34 S. W. Rep. 843.

⁸ *Bd. of Ed. v. Grant* (Mich.), 64 N. W. Rep. 1050; *Gilmore v. Westerman* (Wash.), 43 Pac. Rep. 345; *Wilson v. Webber* (Sup.), 36 N. Y. Supp. 550; *but see contra*, *Buffalo Cement Co. v. McNaughton* (Sup.), 35 N. Y. Supp. 45; *see* 17 Amer. & Eng. Ency. Law 527-9.

⁹ *Brower v. Thompson Lumber Co.* (Oreg.), 43 Pac. Rep. 659.

been held that the right of a third party to a contract to sue upon it does not extend to the case of a contract under seal.¹

For like reasons, a subcontractor is not liable to the owner for negligently and unskillfully doing his work by which the owner is injured, there being no contract between them. The owner should bring suit against the principal contractor.² A subcontractor can not hold a company or proprietor liable on their contract with the principal contractor; nor can the theory that the contractor was an agent of the company be a ground on which to hold it liable.³ A wife is not liable for a contract for sinking a well upon her property, made by the husband without her authority, as his own enterprise and in his own interest.⁴ A third party is not liable to a contractor for work done on the representation, by the owner and employer, that the said third party would pay for the work, the contractor never having communicated such representation to the third party nor having obtained his assent to it.⁵ A property owner on a street is not a party to a contract for the improvement of the street made between the contractor and the superintendent of the streets; and where a city has entered into a contract to furnish certain things to its citizens, the city, and not a citizen, is the proper party to bring action against the company for a breach of such contract.⁶

Where one buys at sheriff's sale the property of a contractor who has failed and, taking the place of the contractor, under a partly performed building contract, completed the work for him, he is entitled only to the amount which would have been due the contractor, who had been overpaid for the work already done by him.⁷

18. Third Party—Sureties.—When the contractor fails or refuses to complete his contract, it frequently happens that the surety of the contractor assumes the contract and completes the work, in which case he takes the place of the contractor, assumes all the burdens, and takes the benefits. He may be mentioned in the body of the contract as a party, or he may assume the work under an assignment from the contractor, or by permission of the owner of the works.

While not strictly a party to the contract, as contracts are usually expressed, yet the surety is frequently the responsible party behind the contractor, and the party to whom the company or owner looks for the ultimate performance and completion of the contract. The contractor is employed for his skill and competence to do the work, and the surety is regarded as the backer who will see to it that it is completely performed. It is, therefore,

¹ 3 Amer. & Eng. Ency. Law 866. *See the entries of several states, which allow actions when the common-law practice would not.*

² Bissel v. Roden, 34 Mo. 63 [1864].

³ Blanding v. Davenport (Ia.), 55 N. W. Rep. 81; Epeneter v. Montgomery Co. (Iowa), 67 N. W. Rep. 93.

⁴ Devine v. McMillan, 61 Ill. App. 571.

⁵ Stidham v. Sanford, 36 N. Y. Supp. Ct. 341 [1873].

⁶ Dyer v. Barstow, 50 Cal. 652 [1873].

⁷ Cleburne W. I. & L. Co. v. Cleburne (Tex.), 85 S. W. Rep. 733.

⁸ Marshall v. Brick (Pa. Sup.), 3 Rep. 530.

important that the relations of the surety to the parties and the contract be understood. The suretyship of a party is created usually, not in the contract, but in a separate instrument, called a bond. Frequently there is no mention of the surety in the contract, yet upon the execution of the contract may depend the binding effect of the bond.

19. Third Parties, Sureties are Not Liable to Them.—If the bond guaranty that the contractor shall pay for all labor and materials furnished him in executing the contract, it seems that laborers and materialmen have certain rights.¹ A contract of guaranty that a contractor should perform his contract to erect buildings, and to pay for the materials and labor so that there should be no liens, does not give a materialman a right to sue the guarantor.² Sureties on a bond conditioned that the building should be turned over to the owner free from all liens for labor and materials, are not liable for labor and materials furnished to the contractor and subcontractors on their individual credit.³ A surety on a bond conditioned that the contractor shall pay all debts incurred by the contractor is not liable to subcontractors for labor and materials furnished.⁴ For a creditor of the contractor to recover from the surety, it must appear that the creditor knew of the agreement on the part of the surety to pay, before he performed the work or furnished the materials.⁵ In other words, he must have trusted the contractor on account of or by reason of the additional security.

20. Surety Released by Unauthorized Changes in the Contract.—A surety is one who has assumed certain obligations in relation to a contract but who is not a party to the contract. He is bound in the manner and to the extent provided in the obligation and no further. If he has undertaken to guaranty the performance of an express contract under certain circumstances, he cannot be held to fulfill his obligation with respect to a different contract or under different circumstances. A variation or alteration made in the contract by the parties thereto without the surety's consent is fatal to his obligation.⁶ It is not necessary that he should sustain injury in consequence of the change; he may stand upon its terms, and if a change is made without his consent it is fatal to his liability,⁷ even if the change is for the benefit of the surety.⁸

¹ *Doll v. Crume* (Neb.), 59 N. W. Rep. 896.

² *Weller v. Goble*, 66 Iowa 113; *accord* *Stetson v. McDonald*, 32 Pac. Rep. 108; *see also* *Kelly v. Kellogg*, 79 Ill. 477; *McChesney v. Syracuse*, 23 N. Y. Supp. 507; and *Bell v. Paul* (Neb.), 52 N. W. Rep. 1110.

³ *Stetson v. McDonald*, *McChesney v. Syracuse*, *Bell v. Paul*, *supra*.

⁴ *Swinmiller v. State* (Ind. App.), 44 N. E. Rep. 60.

⁵ *Ball v. Newton*, 7 Cush. (Mass.) 599.

⁶ *St. Albans Bk. v. Dillon*, 30 Vt. 122;

Watriss v. Pierce, 32 N. H. 550; *Gen'l St. Nav. Co. v. Roit*, 6 C. B. (N. S.) 550.

⁷ *Simonson v. Thor* (Minn.), 31 N. W. Rep. 861 [1887]; *Berks Co. v. Ross*, 3 Binney (Pa.) 520; 24 Amer. & Eng. Ency. Law 838; 29 Amer. & Eng. Ency. Law 796; *but see contra*, *Hnone v. Dambach*, 4 Pa. Co. Ct. Rep. 833; *Commissioners, etc., v. Ross*, 3 Binney (Pa.) 520; *Miller v. Stewart*, 4 Wash. C. C. 26; *per Story* in *Miller v. Stewart*, 9 Wheat. 680 [1824].

⁸ *Weir Plow Co. v. Walmslev*, 110 Ind. 242; *but see* *Hamilton v. Woodworth* (Mont.), 42 Pac. Rep. 849.

* See Sec. 71, *infra*.

A departure from the terms of the contract by making payments on orders of the contractor without reference to the state of the work or the terms of the contract, or in excess of the installments or percentage due under the contract, is sufficient variation to discharge surety from his obligation.¹ The provision that the last of several installments shall be paid when the structure is completed operates as a security to the owner, and the surety is entitled to the benefit thereof. If deprived of any part of such security he is discharged from liability to that extent.² 'The contractor should not be overpaid nor should his compensation be increased.'

'The enforced payment or deduction of claims of creditors against the contractor held by the owner as attorney for said creditors is not such a breach of contract as will release the sureties on the contractor's bond.' It does not matter, it seems, that the overpayment was made on the fraudulent representations of the contractor that the work was half done, when the contract provides that the payments shall be estimated by the engineer. 'The sureties are discharged.' If the contract stipulates that payments shall be made as the work progresses, on the estimates of the architect, payments must not be made without such estimates or in excess of them, without the consent of the surety.³ The payments may be made without the architect's certificates, it seems, if not in excess of what the architect's estimates would have been.'

If by the contract the architect's estimate is made conclusive and a certain per cent. of such estimate is reserved until completion, it is as much for the indemnity of the surety as for the owner. If the surety has executed a written guaranty for the faithful performance of the contract by the contractor, the surety is bound by the engineer's estimate, and is not released by the fact that the owner has paid more than the agreed per cent. of the work done according to the contract price, but not more than the correct per cent. of the architect's estimate.⁴

However it has been held that the making and giving to a material-man of an order by the contractor, and the acceptance of the same by the owner, for an amount greater than the estimate of amount due to contractor, did not constitute an advance payment which would release the surety.⁵

¹ *Simonson v. Grant*, 36 Minn. 439 [1887]; and see 39 Minn. 493; *Evans v. Graden* (Mo.), 28 S. W. Rep. 439; *Bell v. Paul* (Neb.), 52 N. W. Rep. 1110; *General S. Nav. Co. v. Ro't*, 6 C. B. (N. S.) 550; *Gordon v. Rae*, 8 El. & Bl. 1065; but see *Kauffman v. Cooper* (Neb.), 65 N. W. Rep. 796.

² *Pickard v. Schantz* (Miss.), 12 So. Rep. 544.

³ *Warden v. Ryan*, 37 Mo. App. 466.

⁴ *De Mattos v. Jordan* (Wash.), 46 Pac. Rep. 402.

⁵ *Board of Commissioners v. Branham* (C. C.), 57 Fed. Rep. 179.

⁶ *Bell v. Paul* (Neb.), 52 N. W. Rep. 1110; *Kane v. Thuener*, 1 Mo. App. 722; *Gato v. Warrington* (Fla.), 19 So. Rep. 888, *received weekly pay-rolls and materials delivered*.

⁷ *Smith v. Mo'leson* (N. Y. App.), 42 ~~How~~ E. Rep. 669; but see *Brennan v. Clarke* Neb. 385.

⁸ *Finney v. Condon*, 86 Ill. 78 [1877].

⁹ *De Mattos v. Jordan* (Wash.), 46 Pac. Rep. 402.

When the obligation of the contractor was to furnish, prepare, and set granite, and the owner was to make monthly payments of a certain per cent. of the estimated value of the work "performed on the building," payment for granite prepared as well as granite actually put in the building was held not to release the contractor's sureties.¹

Payment in full to a contractor upon completion of his contract,² or partial payments when the work has been substantially completed to the required stages,³ or payment to contractors who have fraudulently concealed defective work,⁴ will not discharge a surety even though the owner paid the contractor without retaining enough to cover the claims of lienmen, when his contract authorized him to do so.⁵

Many changes made in a construction contract for a consideration and without the consent of the surety have been held to discharge or release him from liability—thus an extension of the time for completion.⁶ To obtain his discharge the surety must plead the extension in his answer and he must prove it at the trial.⁷ It has been held that an extension of time and overpayment did not release a surety on a bond providing that the contractor should pay for all labor and materials furnished him, as to the rights of laborers and materialmen.⁸ The extension of time of payment must be for a definite time, and on a sufficient consideration to discharge the surety.⁹ The act of materialmen in allowing a contractor thirty days in which to pay for materials furnished does not release a surety obligated to pay for all materials furnished.¹⁰

Failure of the owner to insure property as agreed,¹¹ or a change in the person of the architect without the surety's knowledge or consent;¹² or a refusal by the owner to have the price of alterations fixed as provided in the contract, by arbitrators;¹³ or if certain matters are to be determined by arbitration and certain other matters are afterwards included in the submission without the knowledge or consent of the surety,¹⁴ then the surety may be discharged.

Sureties are released by a departure from the terms of the contract in respect to plan and materials, without the knowledge and consent of the

¹ *Smith v. Molleson* (N. Y. App.), 42 N. Y. Rep. 669.

² *Duluth v. Heney*, 43 Minn. 155.

³ *Stimson Mill Co. v. Riley* (Cal.), 42 Cal. Rep. 1072.

⁴ *Kingston v. Harding*, 2 Q. B. 404 (1892).

⁵ *Casey v. Gun*, 29 Mo. App. 49.

⁶ *Todd v. School Dist.*, 40 Mich. 294; *see* 61 Mich. 426; *Hall v. Johnston* (Tex.) 24 S. W. Rep. 861; *Samuell v. Shaworth*, 3 Mer. Ch. 272; *Hill v. Witter*, 2 Phila. (Pa.) 72; *Mayhew v. Cricket*, 3 Swanst. Ch. 185.

⁷ *Hayden v. Cook* (Neb.), 52 N. W. Rep. 165; *but see Hanks v. Gerbracht*, 26 N. Y. Supp. 1097.

⁸ *Doll v. Crime* (Neb.), 59 N. W. Rep. 806; *Conn v. State*, 125 Ind. 514; *Steffes v. Lemke*, 40 Minn. 27.

⁹ *Houston v. Braden* (Tex. Civ. App.), 37 S. W. Rep. 467.

¹⁰ *Wilson v. Webber* (Sup.), 36 N. Y. Supp. 550.

¹¹ *Watts v. Shuttleworth*, 5 H. & N. 235.

¹² *Kane v. Thuener*, 1 Mo. App. Rep. 725.

¹³ *Truckee Lodge v. Wood*, 14 Nev. 293.

¹⁴ *Cooke v. Odd Fellows* (Sup.), 1 N. Y. Supp. 498.

surety.¹ An agreement between the owner and contractor to add another story to a building;² to substitute steam heat for stoves and a gravel roof for a tin roof;³ to increase the cost of plastering by \$221, and adding to the expense a bulkhead for sewer connections, and changing the arrangements of the closets;⁴ an interlineation in the specifications and addition of the words, "sliding doors between hall and parlor" and "bath-room,"⁵ have each been held to release the surety on the contractor's bond.

An agreement, endorsed on a building contract by the owner and contractor, providing for additional work for additional compensation, has been held not such an alteration of the contract as will release the contractor's sureties.⁶ A surety for a subcontractor between him and the contractor is not released by changes made in the specifications and plans by the subcontractor under an agreement with the owner and without the knowledge of the contractor;⁷ and alterations without the knowledge or consent of the owner will not discharge the surety on the bond.⁸ If the contractor simply consent to certain changes in the minor details of the work but without binding himself to conform to such changes and without any agreement as to the modification of the original contract, it will not discharge the surety.⁹ Such agreements to change the terms of a contract, by which the surety will be discharged, need not, it seems, be in writing nor in any precise form of words, nor even in express language; they may be inferred from acts, declarations, circumstances, and facts.¹⁰

If the contract provide that the contractor should make any alterations or additions required by the owner, the price to be subject to addition or deduction therefor as might be agreed on, the sureties cannot defend against liability, because the owner, in completing the building after its abandonment by the contractor, as was authorized by the contract, deviated from the specifications, nor because changes were made before the abandonment with the assent of the contractor.¹¹

21. Changes which Will Not Release the Surety.—When the contract provides that the owner, at any time during the progress of the work, shall have the right to make alterations, changes, or additions to the structure, and that the same shall not invalidate the contract; changes and additions made by him will not release the surety on the contractor's bond.¹² If

¹ *Erickson v. Brandt* (Minn.), 55 N. W. Rep. 62.

² *Judah v. Zimmerman*, 22 Ind. 388.

³ *Evans v. Graden* (Mo.), 28 S. W. Rep. 439.

⁴ *Beers v. Strimple* (Mo. App.), 22 S. W. Rep. 620.

⁵ *Lancaster v. Barrett*, 1 Pa. Sup. Ct. Rep. 9.

⁶ *Barclay v. Alsip* (Pa. Sup.), 24 Atl. Rep. 1067.

⁷ *Henricus v. Englert* (N. Y. App.), 33 N. E. Rep. 550.

⁸ *Consaul v. Sheldon* (Neb.), 53 N. W. Rep. 1104.

⁹ *Henricus v. Englert*, *supra*.

¹⁰ *Brooks v. Wright* (Mass.), 13 Allen 72; *Miller v. Stewart*, 4 Wash. C. C. 26.

¹¹ *De Mattos v. Jordan* (Wash.), 46 Pac. Rep. 402.

¹² *Hayden v. Cook*, 34 Neb. 670; *McFountain* (Miss.), 8 So. Rep. 509 [*Smith v. Molleson* (N. Y. App.), E. Rep. 669; *McLennan v. Wellis* 48 Kans. 756.

the owner refuses to have the prices of such changes determined in the manner provided by the contract, then the sureties will be released.¹ The changes must be reasonable, and not materially increase the cost of the structure beyond the contract price.² A change in the plan of a building by moving the wall out two inches, and in the specifications by substituting walnut, cherry, and poplar, instead of pine, in certain parts of the building, has been held reasonable, and that the sureties were *not* released by reason thereof.³ A change from stone window-lintels to railroad iron has been held *not* to affect the obligation of the surety,⁴ nor a change of the fronting of a building when the sureties had never seen the original plans.⁵

When the contract provides that no new work shall be considered as extra work unless a separate estimate be submitted by the contractor, and signed by the engineer and owner, and that only such work shall be paid for as has been authorized in writing, the owner may waive compliance with the provision, and the sureties on the contractor's bond have been held not to be discharged because the provision had been disregarded.⁶ A different view seems to have been taken where the contract provided that the superintendent might make alterations without invalidating the contract; that any difference in the expense should be determined by him, and that in case of any such alteration the expense must be agreed on in writing, and signed by said parties and the superintendent before the work was done, and any allowance made therefor; it was held that the superintendent had no authority to make alterations without consulting the surety.⁷ A surety for the owner has been held to be entitled to the benefit of a provision in the contract that the final payment shall not be paid until thirty days after the work is completed, and only on the certificate of the engineer.⁸

22. Surety Discharged by Other Causes.—A surety may be discharged from his obligation by the death of the contractor; but where the contractors make a partnership, the dissolution of the partnership does not release the surety on a bond to pay for all labor and materials furnished,⁹ nor does the assignment of one contractor to the other joint contractor without notice to the surety release him.¹⁰ The fact that the performance of the contract has become impossible, without any neglect or fault of the contractor, will release the sureties. An instance of the latter case is where the particular subject-matter is dead, or has been destroyed, and cannot be rebuilt or replaced, as the delivery of an animal which has died.¹¹

¹ *Truckee Lodge v. Wood*, 14 Nev. 293.

² *Consaul v. Sheldon* (Neb.), 52 N. W. Rep. 1104.

³ *McLennan v. Wellington* (Kan.), 30 Pac. Rep. 183.

⁴ *Howard Co. v. Baker* (Mo.), 924 S. W. Rep. 200.

⁵ *Dorsey v. McGee*, 30 Neb. 657.

⁶ *Consaul v. Sheldon* (Neb.), 52 N. W. 1104; *see also*, *Smith v. Molleson* (N. Y.

App.), 42 N. E. Rep. 669.

⁷ *Beers v. Strimple* (Mo.), 23 S. W. Rep. 620.

⁸ *Beharrell v. Quimby* (Mass.), 39 N. E. Rep. 407.

⁹ *Kauffman v. Cooper* (Neb.), 65 N. W. Rep. 796.

¹⁰ *Abbott v. Morrisette*, 46 Minn. 10.

¹¹ *Steele v. Buck*, 61 Ill. 343 [1871].

PERSONS AS PARTIES.—WHO MAY CONTRACT.

23. Disabilities to which Persons are Subject.—The rights of parties to enter into and enjoy the rights of a contract are modified by the special condition or status of the parties. Natural persons may be affected by various private conditions: such as infancy, marriage, and conditions affecting the mind, or by their political and social status; while the powers of artificial persons, known as corporations, are defined and limited by the law of their creation. The extent of the latter must be sought in the act of sovereign power, by which they exist. The incapacities created by the private conditions of persons are subjects of greater practical importance than those of the political and social standing of the parties.¹

They are based upon the fundamental principle that a contract cannot be created unless there is mutual consent of the parties and an intelligent understanding of its terms. Any mental infirmity of either or both parties that precludes the possibility of a just apprehension of the terms of the agreement, or of an intelligent assent to them, destroys one of the essential elements of a contract.²

24. Infants.—Persons under twenty-one, and, in some states, women under eighteen years of age, commonly known as infants, are regarded by the law as lacking in judgment and understanding sufficient to enable them to guard their own interests, and the law protects them against their own improvidence, or the designs of others, by allowing them to avoid acts, contracts, or conveyances to which they are parties, and that are not manifestly to their interests. Before that age the law presumes their faculties to be immature and incompetent, and seeks to guard against the artifice and cunning of the world. This protection is afforded by allowing them certain privileges of avoiding their acts and agreements, or by declaring them voidable and not binding. The privileges are entirely personal, and the infant alone can take advantage of them. If the other party to the contract be an adult, the reason which permits the infant to escape its force does not apply to the adult, and he is bound thereby, despite the want of reciprocal responsibility on the infant's part. The adult is bound by the agreement, though the infant may avoid it. This may not seem strict justice, but it is founded upon the theory that the adult has entered into the contract with all the experience and knowledge requisite to avoid fraud and imposition, which it is presumed the infant has not. For the same reason a third person not a party to the contract cannot take advantage of the infancy of one of the parties to avoid it unless it be void from the beginning.

An infant's contract is not necessarily void and without binding force; some contracts are voidable at the option and discretion of the infant, and

¹ Leake's Digest of Contracts, p. 537.² Story on Contracts, chap. 2.

others are binding. If the agreement be positively injurious¹ to him, and can only operate to his prejudice, it is absolutely void, for it is self-evident that unfair advantage and influence has been exercised over him. Such is a bond executed by him as a surety.

Contracts that are for his benefit may be affirmed or avoided by him when he arrives at age, when he is presumed to have arrived at years of discretion. Executory contracts of an infant are generally voidable, and he may refuse to perform during infancy, or disaffirm them when he becomes of age, and leave the other party without remedy. But if a contract is completely executed, and it is beneficial to the infant, and was entered into in good faith, the infant cannot rescind it unless he can restore what he has received and put the other party in the same position that he occupied before the contract. An infant is also liable for the fair value of necessities supplied to him, not on his express contract, but on a contract implied by law, which gives a reasonable price to those who furnish necessities, "since an infant must live, as well as a man."²

Though an infant may not contract for himself, he may act as agent for another, and his acts are as binding upon the principal as an adult's.³ He cannot appoint an attorney, nor sue or be sued, except by next friend or guardian, and in general has no legal capacity to act for himself.⁴ An infant is liable for injuries to property or persons wrongfully committed by him. As is often said, "his privilege of infancy is given to him as a shield, and not as a sword." He is not, however, liable for the evil consequences of a breach of contract.⁵

25. Imbeciles, Inebriates, and Lunatics.—For the same general reasons a contract made by an idiot, a lunatic, or drunkard may be avoided in the same ways as those recited for infants, if it can be proved that the party is incapable of reasoning and judging of what is for his benefit. Much that has been said of the infant may be repeated for them. Their contracts are voidable only and may be ratified upon their returning to reason. If a person has agreed to sign a contract when sober, the fact that he was intoxicated at the time he did sign it will not excuse him from liability.⁶ And the contract of an habitual drunkard is good if made in a sober interval.⁷

"Mere weakness of mind is no ground for incapacity, and does not afford

¹ A later doctrine exists that all contracts of an infant are voidable which relieve the court of the responsibility of deciding what is necessarily, injurious to the infant. 10 Amer. & Eng. Ency. Law 628 *et seq.*

² Story on Contracts 103-130. As to what are and what are not necessities is sometimes a nice question, not perfectly well settled.

³ 1 Amer. & Eng. Ency. Law 334.

⁴ Robbins v. Mount, 33 How. Pr. 24 [1867].

⁵ 10 Amer. & Eng. Ency. Law 674-8.

⁶ Page v. Kreky (Sup.), 17 N. Y. Supp. 764 [1892].

⁷ Ritters' Appeal, 9 P. F. Sm. 9; Caulkins v. Fry, 35 Conn. 170; Evans v. Horan, 53 M. D. 602; Wait v. Maxwell, 5 Pick. 217; Elston v. Jasper, 45 Texas 409; Breckenridge v. Ormsby, 1 J. J. Marsh. 236. For more about the insane, or idiots, see Pollock on Contracts, p. 419, and notes.

sufficient ground for setting aside a contract, but it may support an inference of fraud and unfair practice when the contract is entirely to the disadvantage of the weaker party. A contract obtained by fraud will be void in any case, whatever be the comparative intelligence of the parties, but a court of equity will set aside a contract where it is evident that advantage has been taken of a weak-minded person, when it would not give relief to the same contract between parties of sound understanding." As in the case of an infant, if the mind of one party had become impaired by age, the contract is none the less operative against the other party if the latter be in full possession of his faculties.¹

The ground of relief in all these cases is based upon two principles: First, that of mutuality—a capacity to comprehend the agreement into which they have entered, and an understanding of the terms of the agreement; secondly, that no fraud be practised or unlawful advantage be taken of either party. This protection is given to all parties, infants or adults, sane or insane, intelligent or idiotic, sober or drunk, and, in the language of a prominent English jurist, "it is unaccountable that a man shall not be able to excuse himself by the visitation of heaven, when he may plead duress from men to avoid his own acts." Justice will not permit the strong to take advantage of the weak. It is sufficient to invalidate any contract if it clearly appear that the party contracting did not at the time understand what he was about.

Intoxication may afford relief from a contract only when the party is so drunk that he cannot exercise his judgment. It must be so excessive and absolute as to suspend the reason. "The merriment of the cheerful cup, which rather revives the spirits than stupefies the reason, is no hindrance to the contracting of just obligations." If the lunatic contract during a lucid period, or the idiot when his reason is restored, or a drunkard when he knows what he is about, the contract may be established, and will be sustained.²

Many fine questions arise upon this subject upon which volumes have been written—questions as to what constitutes a ratification or new promise of an infant at his maturity, what are necessities, what degree of weak-mindedness, or insanity, or intoxication will afford relief, etc., but they are too cumbersome to treat at length in this work.³

Generally speaking, each and all are liable for necessities furnished in good faith, and on executed contracts. To escape liability they must restore to the other party what they have received on the contract. If a contract shows on its face good judgment on the part of the imbecile as a shrewd

¹ *Harmon v. Harmon* (Cir. Ct.), 51 Fed. Rep. 113.

² *See Sands v. Potter* (Ill. Sup.), 46 N. E. Rep. 282.

³ *See Story on Contracts*, Part 2; Amer.

& Eng. Ency. Law (subjects). Pollock on Contracts, Leake's Digest of Law of Contracts, and other standard works on the subject.

bargain, and it is to his benefit, the rule ought not to apply. Parties who have been adjudged insane or idiotic by a court and a guardian has been appointed, are wholly incapacitated from contracting, and contracts entered into by them are void.¹ To enforce a contract with a person habitually insane there must be proof that the same person was sane and capable of contracting at the time of the transaction.²

26. Married Women.—At common law a married woman could not contract, sue, or be sued in her own name. To prevent domestic discord and create a legal unity, the will of the husband was made paramount. Man and wife were regarded as one person in their legal status, and whatever a married woman did her husband should join in it. The common law still prevails in some parts of the United States, but in most states it is modified by statutes, which are so different in the several states that it is thought inadvisable to attempt to discuss them. Suffice it to say that a married woman should not be made a party to a contract, without the statutes of the state expressly grant the power to contract, independent of her husband, and then the requirements of the statute should be carefully studied and explicitly followed. Much trouble and loss have been experienced by contractors by neglecting to inquire into the marital relations of parties and the law governing them, peculiar to the jurisdiction. Contracts have been made and structures erected for which no recovery could be had, because the contract was void or the structure has been erected upon land owned by the wife when the husband has assumed the obligation to pay. For like reasons it has been held that a woman cannot contract with her husband, and such contracts have generally been held not binding. In the absence of a statute giving such authority, the legal incapacity to contract remains as at common law. At common law a contract or promissory note between husband and wife was absolutely void.³ And the same has been held in New York state, where no statute had been passed as late as 1889. But, although contracts between husband and wife are invalid in a court of law, courts of equity may give effect to agreements and transactions between them so far as they are just and fair and equitable and ought to be enforced. The agreement should not be voluntary, but should be for some consideration.⁴ The difficulty doubtless has been that such contracts could not be enforced, as the courts would entertain no action on them. The law has been modified in many states.

A woman may employ her husband to act as her agent to transact any and all of her business, and it has been held that she might contract with him to do all her work; that she could contract with him for the construction of a building or any part of it for a stipulated price and by the job. If he employed subcontractors to perform the work he had undertaken, it was

¹ 11 Amer. & Eng. Ency. Law 134.

² *Ricketts v. Jolliff*, 62 Miss. 440 [1884].

³ *Keil v. Eggleston*, 140 Mass. 202 [1885].

and cases cited.

⁴ *Hendricks v. Isaacs*, 117 N. Y. 411 [1889].

intimated that the subcontractor must look to the husband for his pay, even though he supposed the husband to be the owner of the property; but that for work the subcontractor had done with the wife's knowledge that was not a part of the husband's contract work, she must pay him for as if it were in fact *her* work.¹ A contract between a husband and wife who had parted has been held *not* void.² In most states a woman has the legal right to bind herself by a contract, and she and her own property will be liable for debts so incurred. She may contract for the erection of buildings upon her property.³ A married woman may contract as an agent of her husband or as agent of third parties. She may contract for necessities and bind her husband to pay therefor, but it is on his behalf and she assumes no responsibility herself.

27. Other Conditions Affecting a Person's Capacity to Contract.—Disabilities and forfeitures incurred on account of political and social conditions of parties are nearly obsolete in this country. Outlawry is almost wholly unknown. Attainder is prohibited by our constitution, and in times of peace a contract made and obligations assumed by an alien or foreigner will be enforced by our courts. If war be declared by or against the country of which he is a citizen he becomes an alien enemy; his legal right to sue upon the contract is suspended until peace is declared. A contract entered into during war between an alien and citizen is utterly void, for the law declares such contracts illegal, because if permitted, an enemy would thereby be enabled to disturb a nation's finances and wage war on the internal business and credit of a country, to the destruction of its resources. The law of nations prohibits every kind of trading, commercial dealing, or contract between citizens of two countries at war which tends to increase the resources of the enemy or weaken the power of home government.

Seamen are special wards of the law. The general recklessness, thoughtlessness, and ignorance of this class of men is considered and specific favor is shown them. The law of the United States protects them from recovery of any debt greater than one dollar incurred during a voyage, and a sailor need only produce his shipping papers to be dismissed from court. Contracts of seamen for services constitute the bulk of this class of cases, and as they are remote to engineering, the profession is referred to books specially treating the subject.

In some jurisdictions bankrupts receive the special protection of the law. Since the solvency of a person or corporation is one of the most necessary things to inquire into, it can hardly be thought that any one will undertake to enter into an agreement with a bankrupt without first ascertaining his resources or requiring a bond as security.

The infirmities of a contract arising from the parties not being *sui juris*

¹ *Fairbanks v. Mothersell*, 60 Barb. 406 [1871].

² *Duryea v. Bliven*, 122 N. Y. 567.

³ *Greenleaf v. Beebe*, 80 Ill. 520 [18].

and capable of contracting are not cured by an assignment of his interest by one of the parties thereto.¹

28. Either Party Under Duress.—Neither party to a contract should have been under duress of person or goods,² nor under great excitement, or fear, or compulsion when the contract was made.³ Mere angry or profane words, or strong or earnest language will not constitute such duress as will relieve a party from his contract. Duress by threats which will avoid a contract only exists where such threats excite or may reasonably excite a fear of some grievous wrong, as bodily injury or unlawful imprisonment.⁴ To make a payment compulsory such pressure must be brought to bear upon the person paying as to interfere in some way with the free enjoyment of his rights of person or property.⁵ The imprisonment, threatened or feared, must have operated on the mind so far as to deprive the contract of the character of a voluntary act.⁶ So it has been held that a contract was not signed under duress when a contractor who had commenced work under a parol contract for grading one mile of roadbed was required to sign a contract for one-half a mile only, and on his refusal to sign the contract the owner said to contractor's men: "I will stand good for no more work you do for contractor." Contractor being unable to continue the work unless the owner paid the men, he signed the contract.⁷ A wife may avoid her contract extorted by a threatened criminal prosecution of her husband on the ground of duress. The fact that the husband has destroyed the forged papers incriminating him, which papers had been surrendered when the wife gave her note, does not prevent the wife from avoiding her note extorted under threats of prosecuting her husband.⁸ Threats of lawful arrest of a person justly amenable to criminal prosecution without circumstances of oppression or fraud do not constitute duress or menace, for which a deed executed under pressure of such threat can be cancelled.⁹

29. Agency—Parties Acting by or through their Agents.—

—"by and between (name of owner or corporation)
acting by and through President, Treasurer, Engineer,
Attorney, Agent, by virtue of the power vested in him by power of
attorney of the day of 18.....
a copy of which is hereto annexed;" or "acting by and through the
..... Commissioners Board of Public
Works, by virtue of the power vested in them by chapter of
the Laws of 18..... of the State of and the amendments

¹ McCorkle v. Goldsmith, 1 Mo. App. Rep. 173.

² 6 Amer. & Eng. Ency. Law, pp. 57, 92, 93; Miller v. Miller, 63 Pa. St. 486 [1871]; Adams v. Scheffer (Col.), 17 Pac. Rep. 21; Jordan v. Elliott (Pa.), 15 Cent. L. J. 232 [1882].

³ 6 Amer. & Eng. Ency. Law 57-59; McCarthy v. Hampton Bldg. Assn., 61 Iowa 287; Lomerson v. Johnson (N. J.), 13

Atl. Rep. 8.

⁴ Adams v. Stringer, 78 Ind. 175 [1881].

⁵ Stover v. Mitchell, 45 Ill. 213 [1867].

⁶ Berrett v. Weber, 125 N. Y. 18 [1890].

⁷ McCormick v. Dalton (Kan.), 35 Pac. Rep. 1113.

⁸ City Bank v. Kusworm (Wis.), 59 N. W. Rep. 564.

⁹ Gregor v. Hyde (C. C. A.), 62 Fed. Rep. 107.

thereto” “or a Board authorized by virtue of an act of stockholders of said company, to construct a.....”

These are clauses that should never be omitted where the contract is executed by parties other than those on whose behalf it is made. It is a clause that will protect the engineer, agent, or board, and will afford the contractor information by which he can learn the duties, powers and resources with which the parties propose to act. This is imperative with the contractor, for if the contract is executed by an engineer, officer, or board who has not the requisite authority, the contract is void, and the contractor finds he has done work unauthorized by the principal and for which he may not recover.

30. Principal should be Made the Party — If Agent Assumes the Obligation He will be Liable.—The principal or proprietor should be made the party to the contract, and his [its] name be signed at the end. If the contract is executed by or through an engineer, officer, or agent, the intention must be perfectly plain. The proper form for such a contract is the one given above, although other forms may be binding and the engineer or agent escape liability. Thus in an agreement in the form “Memoranda of agreement between C. [the contractor] and E. [the engineer] on the part of A [the company], the said E. hereby agrees.....signed E,” E. was held liable.¹ In another case, the contract read: “On behalf of B. we hereby consent.....money to be paid to A. and E.; E. to supervise certain work. [Signed, A. and E.]” A. and E. were held liable because A. and E. were to receive payment.² This case has been criticised by good authority, but it nevertheless stands on record.

In a contract of sale where E. as agent for A. agrees.....[signed] E., E. was held personally liable on the contract.³ The tendency seems to be to get away from these precedents, and to interpret the contract, according to the intention of the parties,⁴ but they are established decisions and may be followed.⁵

A mere description in the body of an instrument of a person as agent, without words or necessary implications showing that he signs as agent only, will not exempt him from liability on the contract. So it was held that a contract for the sale of wheat in the following form: “Sold C. 200 quarters wheat [as agents for, etc.], and signed E.,” made E. liable upon the contract.⁶ An engineer or agent who uses his own name instead of that of his principal (company) when he intends to bind the latter, renders himself liable. The word “engineer or agent” appended to his name is universally

¹ Norton v. Herron, Ryan & Moody 229.

² Tanner v. Christian, 4 E. & B 590.

³ Paice v. Walker, L. R. 5 Exch. 173;

Stone v. Wood, 7 Cowen 453.

⁴ Deering v. Thorn (Minn.), 13 Rep. 757.

⁵ Haskell v. Cornish, 13 Cal. 47; Quigley v. De Hass, 82 Pa. St. 267; see also Hutchison v. Eaton, 13 Q. B. D. 861.

⁶ Paice v. Walker, L. R. 5 Exch. 173 [1870]; and see Fairlee v. Fenton, L. R. 5 Exch. 169.

held a mere description of the person. It is held to afford no relief from personal liability, but amounts to no more than if he affixed the abbreviations of his collegiate degrees, as C.E., M.E., or B. Arch.¹

If, on a note, the name of the corporation be signed followed by the name of an individual with "Prest." after it, though without the word "per" between the names, it is the promisory note of the corporation and not a joint note.² If the president had signed his own name and written "Prest." after the signature, it would not have relieved him from personal liability.³ If he does not disclose the name of his company he is personally liable, and parol evidence is not admissible to show that a written instrument was made on behalf of another unless there be something on the face of the instrument to indicate it.⁴

31. Proof of Agency.—Some proof it seems may be offered that it was the intention of the agent to bind his company and not himself.⁵ Evidence may be given that it was known to the one party that the other party was an agent, and evidence may be admitted on the other hand to show that in this particular case he was acting as a principal, having agreed to pay for the work done out of his own money.⁶

A distinction has been made between contracts with public agents and officers who act on behalf of their governments and those made by agents of a private corporation or a person. If a public officer fails to bind his government and no action can be had against it, yet the officer is not personally liable, the public faith being the only security. In the case of a private corporation, the law requires the agent to see that his employer or principal is legally bound by his act, or it holds him personally responsible.⁷ Agency cannot be proved by the declaration of one assuming to act in that capacity nor by declarations of one claiming to act as agent.⁸ The extent of his authority cannot be shown by proving his declarations though accompanied by acts, unless such declarations or acts were brought home to the principal.⁹ Evidence that there was a general understanding

¹ *Hough v. Manzanos*, 4 Exch. Div. 104; *Sayer v. Nichols*, 5 Cal. 487; see *Hill v. Miller*, 76 N. Y. 32 [1879]; *Huskell v. Cornish*, 13 Cal. 47 [1859]; *Sharp v. Smith*, 32 Ill. App. 336, "Directors"; *Paige v. Walker*, L. R. 5 Exch. 173 [1870]; *Fullam v. West Brookfield*, 9 Allen (Mass.) 1, "Committee"; *Sperry v. Farming*, 80 Ill. 371 [1875]; "Trustee"; *Pershing v. Industrial Co.* (Minn.), 59 N. W. R. p. 1084; see 29 Amer. & Eng. Ency. Law 863, note.

² *Reeve v. Bank* (N. J.), 23 Alt. Rep. 853.

³ *Heffner v. Brownell*, 31 N. W. Rep. 947 [1887].

⁴ See collection of cases and references in

8 N. E. Rep. 586, note, and also *Mid Co. Bk. v. Hirsh Bros.*, 4 N. Y. Supp. 385 [1889].

⁵ *Deering v. Thorn* (Minn.) 13 Rep. 757 [1882]; and see also 13 Minn. 106. 187; 14 Minn. 214.

⁶ *Hewes v. Andrews* (Colo.), 20 Pac. Rep. 338 [1889].

⁷ *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60.

⁸ *Brady v. Nagle* (Tex. Civ. App.), 29 S. W. 943; *Burke v. Frye* (Neb.), 62 N. W. Rep. 476; *Fullerton v. McLaughlin* (Sup.), 24 N. Y. Supp. 280; *Dowden v. Cryder* (N. J.), 26 Atl. Rep. 941.

⁹ *Richardson Co. v. School Dist.* (Neb.), 64 N. W. Rep. 218.

among business men that an agency existed has been held admissible,¹ and the agency may be proven by letters and telegrams from the principal.²

32. Names of Parties in Body of Contract should Correspond with Signatures.—The names of the parties in the introduction should correspond strictly with the signatures and seals at the end of the contract, for a variance may be fatal to the contract.³ A contract made in the name of a railroad corporation for grading its roadbed was signed by its engineer, who used his own private seal, subscribing to his signature and seal "Chief Engineer of T., etc., R. Co., and as such its authorized agent to make this agreement." And the court held it was not the corporation's sealed contract; but as the engineer had authority to make a simple contract, that the seal should be disregarded and the contract held a simple contract.⁴ This has not been the universal interpretation of such contracts, and unless it can be shown that a simple contract was entered into preliminary to the sealed instrument, it is submitted that the contract would fail. It is difficult to impose upon the parties a contract which they never contemplated or intended, but if they have undertaken to merge an existing simple contract into a specialty and have failed, then the simple contract remains and the written document is evidence of the terms of that contract. It is very unsafe to draw contracts in such a form; the party who covenants should be the party to sign and seal. If the covenantor does not sign and seal, then he is not liable because it is not his seal;⁵ and the party who has signed and sealed is not liable, for it is not his covenant. It is important to distinguish between simple contracts and contracts under seal in determining whether the engineer [agent] or principal is liable. In simple contracts the intention of the parties should prevail; in contracts under seal the question is, who signed and sealed the specialty and who made the covenant. Therefore a deed made in the name of a corporation authorized by law to have a common seal, signed by the president and secretary of the corporation, but without authority from the board of trustees and not sealed with the corporation seal, was held void.⁶ It seems that a public officer does not bind himself to pay the debt of his principal when, in a sealed instrument, he imposes the obligation upon himself.⁷

¹ *Gregor v. Hudson* (Tex.), 30 S.W. Rep. 489.

² *Farrell v. Edwards* (S. D.), 66 N. W. Rep. 812.

As to the proper manner for corporation officers to sign and indorse negotiable instruments and the liabilities created thereby, see 39 N. W. Rep. 640, *note*, and 3 N. Y. Supp. 771, *note*.

³ *Mott v. Danville Seminary* (Ill.), 21 N. E. Rep. 927.

⁴ *Saxton v. Texas, S. F. & N. R. Co.* (N. M.), 16 Pac. Rep. 851 [1888]; *Haskell*

v. Carnish, 13 Cal. 47 [1889]; *Dickerman v. Ashton*, 21 Minn. 538 [1875].

⁵ See *Whitford v. Laidler*, 94 N. Y. 145; *Appleton v. Binks*, 5 East 148; *Townsend v. Hubbard*, 4 Hill. 351; *McCauley v. Jenny*, 5 Houston (Del.) 132.

⁶ *Mott v. Danville Seminary* (Ill.), 21 N. E. Rep. 927 [1889].

⁷ *Knight v. Clark* (N. J.), 2 Atl. Rep. 780 [1885]; *Huthsing v. Bausquet*, 12 The Reporter 225; but see *Wing v. Glick*, 46 Iowa 473 [1881].

33. Agents should be Duly Authorized to Contract.—"by or through, President, Treasurer, Engineer, or other officer or agent." Every person who enters into a contract with officers or agents of a public corporation is bound at his peril to ascertain the extent of their authority.¹ He must know the extent of their power conferred by the act of incorporation, and notice all public limitations on their authority. Rules and regulations of a private corporation made and signed by the officers cannot, however, affect contracts made by third parties with their agents without notice of such rules.²

34. Unauthorized Acts of Agent may be Ratified or Adopted.—A private corporation, like an individual, may ratify the acts of its officers or agents done in excess of authority, if it could have authorized the act itself.³ It is submitted that if a contract with a private corporation or individual were declared void for want of authority in the agent to contract, that the contractor could recover on an implied contract to pay for the benefit it had received, but not upon the contract under which the work was begun.

35. No Claims or Obligations are Created by Contract of Public Officer or Agent who Acts without Authority.—Contracts by *public* officers, or officers and agents of public corporations, must be strictly within the authority delegated by the act of incorporations.⁴ Contracts made in excess of such power conferred by the sovereign power will not bind the corporation, nor is there any guaranty on the part of the corporation that the forms of law have been complied with because its officers, without authority, attempt to contract.⁵ Those dealing with cities and other public corporations must see to it that its agents have power to act, for no liability is incurred for work done under a void contract.⁶ They must ascertain at their peril that officers are acting within the scope of their lawful powers. They must ascertain and take notice of the extent and power of a building committee to bind the city.⁶ Likewise a party who undertakes work under an order of a court must see to it that the order as entered by the clerk in the records is in accordance with the terms of his agreement, or run the chances of not recov-

¹ Davis v. The City, 3 Phila. 374 [1859]; 1 Dillon Munic. Corp. (Ed. 1873), § 372; Baltimore v. Reynolds, 20 Md. 1; Hume v. United States, 132 U. S. Rep. 406; Wells v. Mich. Mut. L. Ins. Co. (W. Va.), 23 S. E. Rep. 527; Pearce v. Madison & J. R. Co., 21 How. (U. S.) 441; Smith v. Co-operative D. Ass'n, 12 Daly (N. Y.) 304; Little v. Kerr (N. J.), 14 Atl. Rep. 613.

² Walker v. Wilmington, C. & N. R. Co. (N. Car.), 1 S. E. Rep. 366; Griffins v. Land Co., 3 Phila. 447 (1859); Blanding v. Davenport, etc., N. R. Co. (Ia.), 55 N. W. Rep. 81; R. R. & B'king Co. v. Skellie, 16 S. E. Rep. 657.

³ 4 Amer. & Eng. Ency. of Law 247, and cases cited.

⁴ Wallace v. Mayor of San Jose, 29 Cal. 181.

⁵ Daly v. San Francisco, 13 Pac. Rep. 321; Hume v. United States, 132 U. S. Rep. 406, and see Dhrew v. Altoona, 121 Pa. St. 411; McDonald v. Mayor, 68 N. Y. 27; Smith v. City of Newburg, 77 N. Y. 136; Davis v. City, 3 Phila. 374; Miller v. Goodwin, 70 Ill. 659; Bateman v. Mayor, 3 H. & N. 323.

⁶ Cheeney v. Brookfield, 60 Mo. 53, 17 Amer. & Eng. Ency. Law 157, 15 Amer. & Eng. Ency. Law 507-509; Keating v. Kansas City, 84 Mo. 415; Boston E. L. Co. v. Cambridge (Mass.), 39 N. E. Rep. 787; Osgood v. Boston (Mass.), 43 N. E. Rep. 108.

ering for his work. This was a contract to survey, subdivide, map, and classify school lands by a person who had no personal fitness to perform the work, which the commissioners of the court knew. Though it was understood that the person was to employ substitutes to perform the work, it was held that an order entered in the records which fails to mention the fact that the contractor was to employ substitutes, could not be corrected.¹ Contracts made by a receiver of a railroad company for materials and supplies in excess of the needs of the road cannot be enforced against the receiver. It was held, however, that the contractor was entitled to be reimbursed for expenses incurred in good faith under such contracts.²

36. Public Agents Not Liable for Blunders.—A contractor cannot be too cautious and careful in taking public work. Commissioners and boards of public works, city engineers, supervisors, and other officers are likely to mistake the extent of their powers, and to contract for, and order things, for which the contractor can never recover. The innocence and honesty with which the officer oversteps the limit of his authority seem to afford no excuse to the contractor's neglect to ascertain the extent of his powers.³ The corporation is not liable, and if the officer has exercised his honest judgment, and is guilty of no negligence or abuse,⁴ he is not liable for innocent blunders or mistakes.⁵ *

37. Agent's Authority must Come from His Principal.—Contractors will ask "With whom can I safely contract?" The answer to this must depend upon the circumstances and conditions of each case. If the contractee be an incorporated company it will be well to have access to its charter, in which its powers and purposes will be set forth, and a copy of its by-laws will shed some light upon the powers of the persons exercising authority. If a stock company there will be a board of directors, who, in a strict legal sense, are agents and representatives of the corporation and trustees of the stockholders, but in a practical sense the board of directors become, so far as the company's relations to the public are concerned, the corporation itself.⁶ Whatever authority officers, agents, and employees have they must derive from the board of directors or governing power, unless they are conferred by the charter of the corporation or the legislative act creating the body politic. The authority to contract must be given either expressly, impliedly, or by ratification.⁷ Contracts which a corporation may legitimately make, the manner of the making of which is not directed otherwise, may be made by its board of directors without the consent or ratification of stockholders;

¹ *Gano v. Palo Pinto Co. (Tex.)*, 8 S. W. 634 [1888].

² *Little v. Vanderbilt (N. J.)*, 26 Atl. Rep. 1025.

³ 1 Dill. Mun. Corp., § 372.

⁴ *State v. Karn*, 81 N. J. Law 259.

⁵ *Hall v. Crandall*, 29 Cal. 567; *Hum-*

phrey v. Jones, 71 Mo. 62; *Dillon's Mun. Corp.*, vol. 2 (3d ed.), §§ 588, 978 and 979.

⁶ *Board of Com'rs v. L. M. & B. R. Co.*, 7 Amer. Corp. Cas. 26.

⁷ *The L. E. & St. L. Ry. Co. v. McVay*, 98 Ind. Rep. 391 [1884].

* See also Secs. 226-259, "Engineers' Personal Liability."

and in the absence of fraud or collusion on the part of the directors, they are binding on the corporation.¹ If the contractee be a municipal corporation, then the governing body is a board, council, or mayor elected by the people, whose powers and duties are defined in the charter, subject to such restrictions and modifications as the legislature may have made since the city's incorporation. The powers of the general government and its officers must be ascertained in the same manner from the constitution, the laws enacted, and the rules and customs of departments.

38. Authority cannot be Inferred from Business or Family Relations.—From the simple fact that a person is an officer of a corporation one cannot infer authority to contract on its behalf.² The president of a company has no power by virtue of his office simply to enter into a contract on behalf of his company as for the construction of its works.³ Nor can the president and secretary of the company together.⁴ The assents of a director, the company's land committee, its civil engineer and a stockholder altogether do not establish the president's authority or make the contract valid.⁵ It has been held that an engineer charged with the duty of engrossing the contract and procuring the signature of the contractors, for which no particular time was fixed and no limitation was imposed upon his power, may consent to a delay of a month in the execution of a written contract, and the company cannot repudiate the contract on account of such delay, even if unreasonable.⁶

If it appeared that the president was the officer with whom alone all the negotiations were had which resulted in the execution of both contracts; that he was its managing and controlling man; that he was present as its manager at the time of the arbitration, when the mistake in the latter contract was discovered, and that attention being called to it, he acknowledged it, and consented to the change, so that the truth might be set forth, it was held that such officer had power to bind his company by consenting to a change.⁷ If the president and secretary have executed and sealed a contract in the name of a corporation, though not with the express consent of the directors, it is binding on a corporation which has received the benefits of the contract, and has conducted its business in compliance therewith and in such a manner that the directors must have had knowledge of it.⁸ If the president or the executive officer of a corporation cannot, by virtue of his position, contract on behalf of the company, it

¹ *Beveridge v. N. Y. El. R. Co.*, 112 N. Y. 1 [1889].

² *Bisley v. J. B. & W. Ry. Co.*, 1 Hun 202 [1874]; *Ry. E. & P. Co. v. Bank (Sup.)*, 31 N. Y. Supp. 44.

³ *Templine v. Chicago, B. & P. R. Co. (Ia.)*, 35 N. W. Rep. 634 [1887]; *Griffith v. C., B. & P. R. Co. (Ia.)*, 36 N. W. Rep. 901 [1888]; *Bi-Spool S. M. Co. v. Acme Mfg. Co. (Mass.)*, 26 N. E. Rep. 991 [1891]; but see *Loeb Fdy. Co. v. Stout*, 61 Ill. App. 166, and *State v. Heckart*, 62 Mo. App. 427.

⁴ *Mott v. Danville Seminary (Ill.)*, 21 N. E. Rep. 927 [1889].

⁵ *Stanley v. Sheffield & Co. (Ala.)*, 4 So. Rep. 34 [1888].

⁶ *Pratt v. Hudson R. R. Co.*, 21 N. Y. 305.

⁷ *Nichols v. Scranton Steel Co. (N. Y. App.)*, 33 N. E. Rep. 561; *semble Loeb Fdy. Co. v. Stout*, 61 Ill. App. 166.

⁸ *Jourdan v. Long Island R. Co.*, 115 New York 380 [1889].

would not be expected that any of the subordinate officers would have such powers. Such acts may be ratified by the board of directors, or such powers may be presumed and established by proof of previous adoption of similar acts.

If a contractor enters into a contract with an agent he should have proof of that agent's authority or he does so at his peril.¹ * In general, an agent may do such business only as is ordinarily within the scope of his business, but the making of contracts does not in general belong to anybody but the parties themselves, unless express authority is shown, and then only to the extent of the authority conferred.² So it has been held that presidents (see *ante*), general managers, secretaries, attorneys,³ engineers,⁴ and officials in general⁵ cannot contract.*

The mere proof of family relationship does not establish agency between the parties. A son has no authority to act for his parents merely because of the relation existing between them. To establish agency other evidence is required.⁶ The same is true of husband and wife, father and son, or brother and brother.

No power exists, either in the commissioner of public works or in the mayor, or in both acting together, to enter into a contract on behalf of the city for the erection of water-pumping machinery, without previous authority of the city council, or an appropriation therefor.⁷ Authority to borrow money for a public work is not authority to undertake the work.⁸

39. Boards, Committees, and Councils in Their Representative Capacity.—A very common and most unfortunate circumstance for contractors is to work under a committee or board whose members attempt to act individually. Members of boards or committees visit the works, give directions, order changes, and authorize new works which only the body or board as a whole have authority to direct. If a contractor obeys such individual instructions he runs the risk of losing the price of the work, for such work ordered by individual members of a committee, board, or council are unauthorized, and generally no recovery can be had against the corporation or its officials.[†] Good business men would not undertake such methods, but circumstances

¹ *Cases*, 29 Amer. & Eng. Ency. Law, 861. note 2.

² *State v. Michigan City (Ind.)*, 37 N. E. Rep. 1041; *Chicago Gen'l Ry. Co. v. Chicago City Ry. Co.*, 62 Ill. App. 502.

³ *Chicago Gen'l Ry. Co. v. Chicago City Ry. Co.*, *supra*.

⁴ *Jackson v. The N. W. R. Co.*, 1 Hall & Tweele Rep. 75 [1848], *Engineer*. *Ashuelot Mfg. Co. v. Marsh*, 1 Cush. (Mass.) 507; *Lyndon M. Co. v. Lyndon Lit. Inst.*, 63 Vt. 581.

⁵ *Dobson v. More*, 62 Ill. App. 435.

⁶ See 4 Amer. & Eng. Ency. Law 359; 13 S. W. Rep. 1188; *Little v. Kerr* (N.

J.). 44 N. J. 263 [1888]; but see *Ry. E. & P. Co. v. Bank*, 31 N. Y. Supp. 44; *Locust Mt. W. Co. v. Yorgey* (Pa.), 13 Atl. Rep. 956 [1888], *by an engineer*; *Dwenger v. C. & G. T. Ry. Co.*, 98 Ind. 153 [1884]; *The L. E. & St. L. Ry. v. McVay*, 98 Ind. 391 [1884], *general manager*.

⁷ *Walsh v. Curley* (Com. Pl.), 16 N. Y. Supp. 871; *Gibson v. Hardware Co. (Ala.)*, 10 So. Rep. 304.

⁸ *City of Chicago v. Fraser*, 60 Ill. App. 404.

[†] *Goddard v. Harpswell*, 88 Me. 228; but see *Damon v. Granby*, 2 Pick. (Mass.) 345.

* See Sec. 35, *supra*.

† See Secs. 29-39, *supra*.

arise which make such acts very common. Such orders or instructions may be adopted, ratified, and authorized by the body when they become binding, and recovery for work done under them may be had.¹ A committee appointed by a town to take charge of the erection of a building are agents of the town, and can act by agreement of the members separately obtained, and need not be in session as an organized body.² So when a contractor furnished a different stone in the place of stone called for in the contract it was held that testimony of one of the committee appointed to take charge of the building was competent to show that a majority of the committee had agreed to the change, and that the architect, a member of the committee, had so stated to the contractor in presence of the witness.³ A board of public works may exceed its power and its acts or contracts be *ultra vires* and void. For that reason a request by such a board that the contractor suspend work on a street pending an injunction suit by an abutting owner will not make the city liable for delay.⁴ The object and authority of a board of improvement or commissioners being limited to construction and the paying for sewers, the commissioners after completion of the sewers cannot bind the district or themselves as a board by a contract for water for flushing.⁵

40. Public Officers are Presumed to Do Their Duty.—In the absence of proof to the contrary there is a presumption that the public officers do their duty.⁶ This may be an advantage to the contractor if the legality of his claims be contested on account of any dereliction of duty or excess of power on the part of the officers.⁷ Where the record shows the letting of a contract for building a bridge in a city at a price greatly exceeding ten thousand dollars, but does not show whether a tax was imposed or bonds issued in excess of that sum in any one year, it will be presumed that the council did its duty in that respect. The council having acted upon plaintiff's account for the *whole* of the work embraced in said contract, and having ordered it to be paid, except as to a single item of work which the parties agreed to defer, it will be *presumed*, in the absence of anything in the record upon the subject-matter, that said account was verified in the manner required by the charter. In the absence of proof showing that work was not completed according to contract it will be well presumed that the city engineer in reporting a final estimate and the completion of the work, and the city council in approving the report and ordering the payments, did their duty.⁸ The one who attempts to show irregularities must prove that the

¹ Albany City Natl. Bk. v. Albany, 92 N. Y. 363 [1883].

² Shea v. Town of Milford (Mass.), 14 N. E. Rep. 764 [1888].

³ Matthewson v. Grand Rapids (Mich.), 50 N. W. Rep. 651.

⁴ Pine Bluff Water & Light Co. v. Sewer District No. 1 (Ark.), 19 S. W. Rep. 576.

⁵ Valley Tp. v. King Iron Bdge. Co. (Kan. App.), 45 Pac. Rep. 660.

⁶ Howard v. Oshkosh, 33 Wis. 309 [1873].

⁷ Bohall v. Neiwall (Ia.), 39 N. W. Rep. 217 [1888]; also Jenkins v. Stetler (Ind.), 3 N. E. Rep. 7 [1889]; N. Chicago St. R. Co. v. Cheetham, 58 Ill. App. 318.

* See Sec. 48.

public officers did not do their duty.¹ Contracts of public corporations, made through their officers without authority of law, are void, and the corporation may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power, under its charter or constituent statute, to enter into the contract.² Where one has contracted with an alleged corporation, and is sued for failure to perform the contract, he cannot be heard to say that the corporation had no existence, and for that reason no contract was made.³

41. Means of Obtaining Information.—Cautious contractors will ascertain the powers of individuals, boards, and committees in as quiet a manner as possible. The self-esteem of some officials, and the indignant spirit in which they resent any doubts expressed as to their authority to undertake and carry out projects, are enough to convince a shrewd man of the impropriety of seeking information directly from office-holders. Usually the documents of incorporation are public property, and access may be had to them at the government offices. The commercial standing of a corporation may be had at the commercial agencies, and a well informed local attorney may be employed to give a reasonably safe opinion as to the legality of the act, or the liability of the company, or the extent of the duties and powers of its officers. A successful contractor will not sacrifice any honest means to obtain and keep the favor of officials of large corporations, nor will he stupidly demand information of them which may offend when he can indirectly and discreetly inform himself through other channels, whether outside or inside. To secure such information is the legitimate business of attorneys and counselors at law, and they need not divulge the name of their client nor in whose interest they are at work. An engineer should appreciate that the contractors require such information, and he should provide copies of the act or charter under which the work is undertaken, so that bidders and contractors may make such inquiries as seem pertinent to their interests and acquire information of the work to be done.

Complicated questions come up, and many a contractor has performed work only to find when too late that his labor has been for nothing. An instance of the authority of a public officer is given in the following case: Where the legislature or congress directed a public officer, the secretary of the navy, to contract for the construction of public works according to a plan submitted previously and on file, and the officer directed changes in the plan and contract, it was held that the act of congress directing the officer to enter into the contract was not the contract itself, but that the officer who made the contract might vary the details, and that the rule regarding the effect to be given a contract with the United States was the same as in a contract between man and man.⁴

¹ *Hellman v. Shoulters* (Cal.), 44 Pac. Rep. 915.

² *Miller v. Goodwin*, 70 Ill. 659 [1873]; accord *Ryan v. Lynch*, 68 Ill. 160; *Byrne v. E. Carroll* (La.), 12 So. Rep. 521.

³ *Fresno Canal & Irrigation Co. v. Warner* (Cal.), 14 Pac. Rep. 37.

⁴ *Gilbert v. United States*, 1 Ct. of Claims 28 [1863]; *Lord v. Thomas*, 64 N. Y. 107.

42. An Agent or Fiduciary Can have No Interest in the Contract.—A director, public officer, trustee, executor, receiver, engineer, or other agent or fiduciary can have no personal interest in the contract of the company, city, principal, or *cestui* which he represents. A director cannot become a contractor with his company, nor become a member of a company with whom the board of directors has made a contract for the erection of works, nor share in the profits of such a contract. If such contracts are made they will be held to have been made for the benefit of the company which the director represents, and a court of equity may compel him to account for the profits realized under such an agreement.¹ Such a contract may be ratified by the stockholders and they may insist upon the advantages, or they may disaffirm it entirely. A president of a corporation who takes an assignment of a contract for the construction of its works acts as a trustee and for the benefit of the corporation, and not as an assignee of the contractor.² A contract made by a city council in which one of its members is interested may be avoided by the city, and if the contract has not been performed any taxpayer may restrain its enforcement.³ It does not matter that the members who are interested in the contract voted against awarding the contract to themselves or their company.⁴ The mayor should not act as attorney or solicitor for the city of which he is an officer when the city's charter forbids any interest, directly or indirectly, in any contract, office, or appointment.⁵ The city cannot accept a conveyance of real estate subject to a mortgage held by the city solicitor when the statutes prohibit any public officer from becoming interested in any contract for the purchase of property by the state, county, or municipal corporation.⁶ An allowance to a public officer by a contractor or employee out of the profits of a contract with the city or government, however small it may be, is such evidence of fraud as will invalidate the contract.⁷ A contract by a freight agent to allow a contractor a low freight rate in consideration of a share of the profits of his contract,⁸

¹ *Port v. Russe*, 36 Ind. 60; *Covington, etc., R. Co. v. Bowler*, 9 Bush 468; *European Ry. Co. v. Poor*, 59 Me. 377; *Paine v. L. E. & L. R. Co.*, 1 Am. Corp. Cas. 386, 31 Ind. 283 [1869]; *Guild v. Parker*, 43 N. J. Law 430; *G. C. & S. R. Co. v. Kelly*, 77 Ill. 426 [1875].

² *Risley v. I. B. & W. Ry. Co.*, 1 Hun 202 [1874]; and see 19 Am. & Eng. Ency. Law 873, 874.

³ *McElhinney v. City of S. (Neb.)*, 49 N. W. Rep. 705 [1891]; *Gas Co. v. West*, 23 Neb. 852, *followed*.

⁴ *Kennet Elec. Lt. Co. v. Kennet Sq.*, 4 Pa. Dist. Rep. 707; *Foster v. Cape May (N. J.)*, 36 Atl. Rep. 1089 [1897].

⁵ *West v. Berry (Ga.)*, 25 S. E. Rep. 508; but see *Spearman v. Texarkana (Ark.)*, 24 S. W. Rep. 883, where a member of a board of health was allowed to recover on a *quantum meruit* for services as a physician.

It seems the father, brother, or wife of a mayor may have an interest in a contract with the city. *Devlin v. New York (Com. Pl.)*, 23 N. Y. Supp. 888.

⁶ *Marsh v. Hartwell*, 2 Ohio N. P. 389.

⁷ *Lindsey v. The City*, 2 Phila. 212 [1858]; *Robinson v. Patterson (Mich.)*, 39 N. W. Rep. 21 [1888].

⁸ *Barclay v. Williams*, 26 Ill. App. 213 [1887].

or an agreement by a bookkeeper to disclose the financial condition of his employer's business,¹ * are against public policy and not enforceable.

A principal who furnishes his agent money for investment is entitled to follow not only the property bought, but its proceeds, if sold, so long as they can be traced and identified.²

Injunction will lie to restrain a school board from executing a contract with one of its own members to furnish supplies after the board has passed a resolution to purchase from said member; and it is not necessary to wait until the contract is executed.³ Injunction will lie to restrain a public officer from entering into a contract with himself individually to furnish supplies to a public institution.⁴

ARTIFICIAL PARTIES. CORPORATE BODIES.

43. Charter and Statute Limitations.—Contracts of corporations are limited to the powers given by their charters. The act creating the body politic, the articles of incorporation, and the charter given by the state should therefore be consulted and carefully studied. A corporation is a creature of the law. It has no powers except those expressly granted or that are necessary to the exercise and enjoyment of those expressly granted.⁵ The acts and undertakings must not exceed the powers and privileges granted by the charter, for such acts will be *ultra vires* and without effect. It is not vested with all the capacities of a natural person or of an ordinary partnership, but with such only as its charter confers. If it exceeds its charter powers not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers.⁶ A corporation is confined in its operations to projects expressly enumerated in its charter or that are strictly necessary to their performance.

A contract *ultra vires* the charter of a corporation is void. It cannot be made valid by any subsequent act of the corporation; ⁷ that which it cannot make or do it cannot ratify.⁸ The state or sovereign power alone can ratify a contract entered into by a public corporation which is *ultra vires*, and make it valid and binding.⁹ The value of work done for a municipal corporation not pursuant to the charter cannot be recovered.¹⁰

¹ Davenport v. Hulne, 32 N. Y. Supp. 803.

² Harding v. Field (Sup.), 37 N. Y. Supp. 399.

³ Alexander v. Johnson (Ind. Sup.), 41 N. E. Rep. 811.

⁴ Board of Tappan Co. v. Railroad Co., 7 Amer. Corp. Cas. 26; Davis v. Old Colony R. Co., 7 Amer. Corp. Cas. 549.

⁵ Davis v. Old Colony R. Co., 7 Amer.

Corp. Cas. 549.

⁶ Sault Ste. Marie v. Van Deusan, 40 Mich. 429.

⁷ Board of Commissioners v. The L. M. & B. R. Co., 7 Amer. Corp. Cas. 26.

⁸ Brown v. Mayor, 63 N. Y. 239.

⁹ Wallace v. Mayor of S. J., 29 Cal. 181; see also Zottman v. San Francisco and 20 Cal. 497, 20 Cal. 96, and 1 Dill. Mun. Corp., § 372 [1873 ed.].

* See Sec. 85, *infra*.

The contractor, therefore, should not only satisfy himself that the officers or agents acting are the proper persons to enter into the contract on behalf of the corporation, but he must also take notice of the lawful limits of the company's capacity, that the contract is within the scope of the authority conferred by the act of its incorporation, and that the powers granted to it have not been surpassed.¹ He is bound at his peril to take notice of the lawful limits of its capacity,² especially where all acts of incorporation are, or are deemed to be, public acts; for every corporation organized under general law is required to file in the office of the secretary of state a certificate showing the purpose for which the corporation is constituted.³

Some cases of interest to engineers will illustrate the import of this law. A water company in England had been duly incorporated for the supply of a certain district with water from certain sources within the district, and to do all other acts necessary to supply water to the inhabitants according to the true intent of the act. In consequence of the increase in population, the supply within the district became insufficient both in quantity and quality. The water company employed a consulting engineer to make surveys and plans, and to report on the feasibility of obtaining a sufficient supply from a certain stream of water beyond the company's district, the same plans and report to be used by the company in its application to parliament for powers to enlarge its works and to embrace this stream of water in its district. When the engineer brought suit for the value of his services the water company resisted payment on the ground that the act of employing the engineer for the work done was beyond its powers. It was held by the majority of the court that the contract made for the plans and report essential to its application to parliament were not necessarily illegal nor the contract void, but a strong dissenting opinion was delivered by the minority of the court. The case is given to show how strictly the courts may define the powers of corporations. Probably the disposition of the courts can best be shown by giving the last few lines of the learned justice's dissenting opinion: "And when I consider the mischief that has been done by directors, under the temptations offered by interested parties and other considerations, adding to the schemes in which parties have contributed their capital, I own, hard as it may be in a particular case, I am sorry that a lesson should not be read that those who deal with directors must see that they have authority to bind their companies, or must trust the directors personally, a consideration which will make both parties more cautious in their speculations with other people's property."⁴

Likewise it has been held that a railroad company has no power to employ

¹ Evans on Agency, pp. 26, 211, 312; Davis v. Old Colony R. Co., 7 Amer. Corp. Cas. 549; Little v. Jayne, 124 Ill. 123.

² Keating v. Kansas City, 84 Mo. 415; Turney v. Bridgeport, 55 Conn. 412; Trenton Loco. Wks. v. United States, 12 Ct. of

Cl. 147; and see Village of Kent v. Cut Glass Co., 10 Ohio Cir. Ct. Rep. 629.

³ Davis v. Old Colony R. Co., 7 Amer. Corp. Cas. 549.

⁴ Bateman v. Mayor, etc., 3 H. & N. 323.

a mining-engineer to examine and make a report on mines of which the road is the outlet, and that the railroad company is not liable to him for his services, even though its business is benefited as a direct result thereof.¹ It would, without doubt, have been otherwise if the railroad company's charter permitted it to operate mines or engage in mining.

Another case arose under a contract by a corporation organized for the purpose of "purchasing, taking, holding, possessing, selling, improving, and leasing real estate and buildings, manufacture, lease, sale, use of building-stone, lumber, and other building materials," by which the company agreed to pay for services in organizing stock companies to locate and engage in business upon its land. The contract was declared *ultra vires* and void. If the contract had been performed, and the corporation had received the benefit, it would have been estopped from availing itself of such a defense.²

A contract by a railroad company to aid in the construction of the road of another corporation in another state is illegal, though it also provides for the construction of a branch to its own road.³

A subscription for stock, in a company which employs and uses certain articles, by a corporation chartered to manufacture and deal in the same articles has been held beyond its powers.⁴ The construction of a levee has been held without the corporate powers of a village,⁵ as has the reconstruction and repair of a building which had been partly removed for the extension of a street.⁶

44. Other Restrictions to Which Corporate Bodies are Subject—Cost Must be Within the Appropriation or Limit of Indebtedness.—The contractor must ascertain if there be a charter or constitutional limit to the city's or company's indebtedness, for when that limit is reached it cannot create a new debt.⁷ The contract should not create a debt in excess of the fund appropriated for the purposes of the contract,⁸ for the amount that it exceeds the appropriation cannot be recovered.⁹ The contract is void as to the amount that the indebtedness incurred by the contract exceeds the limit fixed by law.¹⁰

¹ *Georg v. Nevada Cent. R. Co.* (Nev.), 38 Pac. Rep. 441; and see *Lewis v. Colgan* (Cal.), 44 Pac. Rep. 1081.

² *Schurr v. N. Y. & B. Sub. Invest. Co.* (Com. Pl.), 18 N. Y. Supp. 454; 16 N. Y. Supp. 210, *affirmed*.

³ *Bostwick v. Chapman*, 60 Conn. 551; and see *Cunningham v. Massena Sp. R. Co.* (Sup.), 63 Hun (N. Y.) 439, 18 N. Y. Supp. 600.

⁴ *Knowles v. Sandercock* (Cal.), 40 Pac. Rep. 1047.

⁵ *Newport v. Batesville & B. Ry. Co.* (Ark.), 24 S. W. Rep. 427.

⁶ *Seecy v. Springfield*, 112 Mass. 512 [1873]; see *Prairie Lodge v. Smith*, 58 Miss. 301.

⁷ *App. of City of Erie*, 91 Pa. St. 398 [1879]; *Soule v. Seattle* (Wash.), 33 Pac.

Rep. 384; *Perkinson v. St. Louis, Mo.* 4 App. 323 [1877]; *State v. Atlantic City* (N. J.), 9 Atl. Rep. 759 [1887].

⁸ *Turmev v. Bridgeport* (Conn.), 12 Atl. Rep. 520; *Dhrew v. Altoona* (Pa.), 15 Atl. Rep. 636.

⁹ *Atlantic City W. W. Co. v. Reed* (N. J.), 15 Atl. Rep. 10; *Culburtson v. Fulton* (Ill.), 18 N. E. Rep. 781.

¹⁰ *Culburtson v. Fulton* (Ill.), 18 N. E. Rep. 781; *Turmev v. Bridgeport* (Conn.), 12 Atl. Rep. 520; *Kingsley v. Brooklyn*, 78 N. Y. 200 [1879]; *Boston Elec. Lt. Co. v. Cambridge* (Mass.), 39 N. E. Rep. 787; *Lamar Water Company v. City of Lamar* (Mo.), 26 S. W. Rep. 1025; *Georgetown W. Co. v. Central T. H. Co.* (Ky.), 34 S. W. Rep. 435.

When a city charter provides that all contracts shall be countersigned by the comptroller, mayor, and clerk, and that the comptroller shall have made an indorsement thereon showing sufficient funds are in the city treasury, or that provision has been made to pay the liability that may arise under such contract, it is essential to the validity of the contract that it have such signatures and indorsement.¹ The execution of a contract by a municipal corporation gives rise to no implied warranty that it has power to make assessments with which to pay for work and materials under the contract, and when a statute authorizing the assessment was adjudged unconstitutional the contractor was unable to collect what was due him.² The city will not, however, be relieved from liability for negligently delaying to raise funds by assessment when it has contracted to pay the contractor out of such a fund.³ It seems that a contract for the performance of work or the furnishing of supplies need not be referred to the city treasurer for his certificate that there is sufficient unappropriated money in its treasury to meet its requirements.⁴ The contractor is supposed to know the powers of the officers with whom he is dealing, and the courts hold that there is no excuse for his not knowing the limit of indebtedness fixed by the charter or legislative act, and the amount of the appropriation. Such ignorance will not avail in an action for the contract price.⁵

45. Appropriation Must Not be Exceeded.—The same law holds when the amount of an appropriation for a specific job is limited; the cost of the work, *including extras*, must not exceed the amount of the appropriation. If it does, the city or town is not liable for the excess over and above the appropriation.⁶ So when money was appropriated by a town to build and furnish a town hall, and a contract was awarded for the erection of a hall at a cost equal to the full amount of the appropriation, it was held that the committee exceeded its authority, and that the contractor could not recover a part of the appropriation set aside to furnish the hall, nor for the extra work he had done; and this decision was made in the face of the fact that a number of the citizens had agreed to guarantee the furnishing of the hall if the committee would expend for the building the entire sum appropriated.⁷ A contract for twenty years, or for an indefinite period, cannot be sustained as a

¹City of Superior v. Morton, 63 Fed. Rep. 357; Holmes v. Avondale, 11 Ohio Cir. Ct. R. 430.

²Barber Asphalt Paving Co. v. Harrisburg, 62 Fed. Rep. 565; *see also* Connelly v. San Francisco (Cal.), 33 Pac. Rep. 1109.

³Little v. Portland (Oreg.), 37 Pac. Rep. 911; *and see* Soule v. Seattle (Wash.), 33 Pac. Rep. 384.

⁴Lamar Water Co. v. Lamar (Mo.), 26 S. W. Rep. 1025.

⁵Gutta Percha Co. v. Ogalalla (Neb.),

59 N. W. Rep. 513; Crampton v. Varna R. Co., L. R. 7 Ch. 568; Keating v. Kansas City, 84 Mo. 415; Perkinson v. St. Louis, 4 Mo. App. 322 [1877]; Turmev v. Bridgeport (Conn.), 12 Atl. Rep. 520.

⁶Turmev v. Bridgeport (Conn.), 12 Atl. Rep. 520 [1888]; Nelson v. Mayor, 63 N. Y. 535 [1876]; *see also* Galveston v. Devlin (Tex.), 19 S. W. Rep. 395; Kingsley v. Brooklyn, 78 N. Y. 200 [1879].

⁷Town of Westminster v. Willard (Vt.), 26 Atl. Rep. 952.

* See Sec. 44, *supra*.

contract for ten years, but is entirely void when the city is authorized to contract for a period not exceeding ten years.¹

If the public records fully disclose all the facts of the case, and the contractor was in no way misled or deceived by the records of the town board, then the town is not liable on the contract or for the reasonable value of the structure when public officers without the requisite power do contract on behalf of the town, even though the structure is accepted after its completion and used by the public generally.² Acceptance of the work will not affect a ratification of the contract,³ nor will any subsequent act on the part of the town or city prevent it from denying the validity of such contract.⁴

If the contract price is within the amount of the appropriation it is valid, even though it reserves authority to make such changes of detail as may be necessary, and though it authorizes the engineer to determine the price of extra work required.⁵ A charter that authorizes a certain *annual* expenditure, over and above certain repairs, for the building of new bridges, in whole or in part, does not prevent the letting of a single contract for a bridge whose total cost shall exceed the annual appropriation.⁶ The fact that there is no money on hand with which to pay for the work does not render the contract invalid where a road and bridge tax has been levied for the current year, though not collected.⁷ If the law requires that provision shall be made for payments under such contracts the necessary funds must be provided beforehand.⁸ The indebtedness of a city cannot be increased beyond the limit fixed, by contracting for an electric-light plant to be leased by it; such an executory contract is forbidden.⁹

46. The Legislature or Congress May Ratify the Contract.—If the power to contract has been derived from the legislature a contract for a sum that exceeds the sum appropriated may be recognized, sanctioned, and made valid by a subsequent act of the legislature, and the contractor may then maintain his action upon the contract against the city.¹⁰ The contract can be ratified only by making an appropriation expressly for its performance.¹¹ The act of the voters of a town subsequently voting an additional sum for the completion of a structure will not ratify an invalid contract.¹²

A contract invalid for want of legislative authority may be made valid by

¹ *Manhattan T. Co. v. Dayton* (C. C. A.), 59 Fed. Rep. 327.

² *Salt Creek v. Bridge Co.* (Kan.), 33 Pac. Rep. 303.

³ *Newport v. Batesville & B. Ry. Co.* (Ark.), 24 S. W. Rep. 427.

⁴ *State, etc., v. Murphy* (Mo.), 31 S. W. Rep. 784.

⁵ *Kingsley v. Brooklyn*, 78 N. Y. 200 [1879].

⁶ *Howard v. Oshkosh*, 33 Wis. 309 [1873].

⁷ *Sullivan v. Commissioners*, 114 Ill. 962.

⁸ *Smilie v. Fresno Co.* (Cal.), 44 Pac. Rep.

556; and see *Cincinnati v. Cincinnati*, 11 Ohio Cir. Ct. Rep. 309.

⁹ *Kuhls v. Laredo* (Tex.), 27 S. W. Rep. 791.

¹⁰ *Spilman v. Parkersburg* (W. Va.), 14 S. E. Rep. 279.

¹¹ *Nelson v. Mayor*, 63 N. Y. 535 [1876]; see also *New Orleans v. New Orleans W. W. Co.*, 13 Sup. Ct. Rep. 142.

¹² *Gutta Percha Co. v. Ogallala* (Neb.), 59 N. W. Rep. 513; *Shipman v. State*, 42 Wis. 377.

¹³ *King v. Mahaska Co.* (Iowa), 39 N. W. Rep. 636 [1888].

a subsequent act of the legislature,¹ but such unauthorized contract is not ratified by a special act authorizing the contractor to sue for the value of extras.² It has been held that the legislature could require county commissioners to provide funds to pay for the erection of public buildings³ if in good conscience the county or city ought to pay, although there was no legal liability.⁴ A city cannot, it seems, be compelled to stand the whole cost of county buildings.⁵ Money raised by taxation for the special purpose of erecting a school-building cannot be diverted by an act of the legislature to the purchase of a site for a normal school in said city, without the assent of the city or its inhabitants.⁶ For the legislature to require a claim to be paid there must be an obligation either moral or equitable.⁷ The constitution of the United States and of the states denies the legislature the power to pass laws impairing the obligation of contracts, and this limitation applies as well to contracts made by the state as to those made by individuals.⁸

An injunction will not lie against a builder to prevent him from proceeding with the work; the owner's remedy is to refuse to ratify or confirm the contract and defend against an action for the contract price.⁹

47. Cases Where Appropriation has been Exceeded. — In determining whether the limit has been exceeded numerous decisions have been made that shed some light on the question. It has been held that certificates issued by a city against lots in payment for the construction of sewers, the same being payable in seven annual installments with interest, do not create an indebtedness within the meaning of an act limiting the indebtedness to 5 per cent of the value of its taxable property.¹⁰ Charges that have been improperly made against the fund should be rejected and deducted to ascertain the maximum balance available.¹¹ If a special tax for paying rent for waterworks, together with the general tax, exceeds the constitutional limit, the contract is void.¹² Indebtedness beyond the constitutional limit at the time of the injury is no defense to an action against a city for damages on account of an injury caused by negligence in the construction and maintenance of its streets.¹³ The issue of bonds is an indebtedness.¹⁴

The disbursement of the fund should be watched by the contractor, that

¹ *Ball v. Presidio Co.* (Tex.), 27 S. W. Rep. 702.

² *Nichols v. State* (Tex.), 32 S. W. Rep. 452.

³ *Commissioners v. People*, 5 Neb. 127; *Guilford v. Supervisors Chenango Co.*, 13 N. Y. 143.

⁴ *Thomas v. Leland*, 24 Wend. (N. Y.) 65, and cases cited in 15 Amer. & Eng. Ency. Law 992.

⁵ *Callam v. Saginaw*, 50 Mich. 7.

⁶ *State v. Treasurer*, 22 Wis. 660 [1868].

⁷ 15 Amer. & Eng. Ency. Law 993.

⁸ *Donalds v. New York State*, 89 N. Y. 36 [1882].

⁹ *Joint School Dist. v. Reid* (Wis.), 51 N. W. Rep. 1089.

¹⁰ *Davis v. Des Moines* (Ia.), 32 N. W. Rep. 470 [1887]; *Grant v. Davenport*, 36 Iowa 395; *Clinton v. Walliker* (Iowa), 68 N. W. Rep. 431; but see *Soule v. Seattle* (Wash.), 33 Pac. Rep. 384.

¹¹ *Kingsley v. Brooklyn*, 78 N. Y. 200 [1879].

¹² *Lamar Water Co. v. Lamar* (Mo.), 26 S. W. Rep. 1025.

¹³ *Bartle v. Des Moines*, 38 Iowa 414 [1874].

¹⁴ *Scott v. Davenport* (Ia.), 34 Ia. 208.

the fund be not exhausted and his labor be without remuneration ;¹ and when the contract price is the full amount of the appropriation he should ascertain by what fund any extra work ordered is to be paid before performing it.² Changes and alterations imposing a greater liability are void, and pay therefor cannot be collected.³

48. Unincorporated Organizations as Parties.—Such are associations, societies, clubs, and congregations who get together and agree to undertake or promote certain plans and schemes for their own or the public benefit. Usually the powers and resources of such organized bodies are indeterminate, and even when the necessary funds are subscribed it is a question as to how many of the subscriptions can be collected. Contractors and engineers who undertake work for such associations, and who are not well protected by liens, bonds, or paid-up subscriptions, or are not well acquainted with the subscribers, will in making their estimates allow for losses and the possible failure to carry out the project. When an unincorporated association enters into a contract, the individual members are liable either upon the ground that they held themselves out as agents of a principal or because they are themselves principals. Persons who engage in an enterprise are liable for the debts they contract, and all who assent to the undertaking or who subsequently ratify it are included in such liability.⁴ If a committee has been appointed to make arrangements they become individually liable for work done and which was procured by a subcommittee of their number, although in making the contract the subcommittee assumed to act as officers of the association.⁵ If a joint signer of a contract who represents the other signers in superintending the work makes changes in the terms of a contract he is personally liable, even though the contractor had full knowledge that the change was unauthorized and unknown to the other signers.⁶ If the contractor, architect, or engineer be one of the promoters and is himself a member of the association and has to bring suit for his services it may puzzle him as to whom he shall sue. If the relations of the subscribers partake of the nature of a partnership, then they are liable both joint and severally.⁷ In dealing with incorporated religious associations special caution should be exercised, for in several states they cannot be sued.⁸

49. Subscribers to a Project.—It has been held that an association of subscribers to a project to obtain a bill through the legislature to build a railroad was a partnership, and that the engineer, who was one of the sub-

¹ *Turmev v. Town of Bridgeport* (Conn.), 12 Atl. Rep. 520.

² *Turmev v. Town of Bridgeport* (Conn.), 12 Atl. R. p. 520; *Richardson v. Grant Co.*, 27 Fed. Rep. 495.

³ *King v. Mahaska Co.* (Iowa), 39 N. W. Rep. 636 [1888]; but see *Shea v. Town of Milford* (Mass.), 14 N. E. Rep. 764 [1888].

⁴ *Lewis v. Tilton*, 64 Iowa 220 [1884].

⁵ *Fredenhall v. Taylor*, 23 Wis. 538; *Landiskowski v. Lark* (Mich.), 66 N. W. Rep. 371.

⁶ *Gutherless v. Ripley* (Iowa), 67 N. W. Rep. 109.

⁷ *Davis v. Shafer*, 50 Fed. Rep. 764.

⁸ 29 Amer. & Eng. Ency. Law 864.

scribers, could not sue one of his associates in the scheme, a copartner, for the value of his services. He should have sued the firm.¹ It might make some difference whether the subscriptions were for stock or merely a donation. The mere act of subscribing to a project does not ordinarily create a partnership unless it is the manifest intention of the parties.² The signers of a subscription paper in the ordinary form are liable severally, and not jointly.³ Each subscriber is liable for the amount of his subscription, and in no way responsible for the payment of the sums subscribed by others.⁴

Under a contract between several farmers and a construction company to build a factory, which contained the provision that "we, the subscribers, agree to pay" the agreed amount for the factory, and a provision that the subscribers should form a corporation, with stock in proportion to their paid-up interest, each subscriber to be liable only for the amount subscribed by him, it was held that the contract was several, and not joint, and that each was liable only for his proportion.⁵ When subscribers have signed at different times and places, and without knowing what subscriptions will be subsequently made, or by whom, the contract does not bind each subscriber to pay the entire sum.⁶ If the amount of subscription is set opposite each subscriber's name, the liability of each is as effectually limited as if such amounts had been (in words) limited in the body of the contract.⁷ A subscriber cannot escape payment of his subscription by an averment that he notified plaintiffs that he had canceled his subscription before they had expended money or performed labor under the contract, there being no averment that the cancellation was made before plaintiffs accepted the contract.⁸ If a contractor would recover a balance due and unpaid for the erection of a structure he cannot sue all the subscribers jointly, but should proceed against those subscribers who are in default, or at least his declaration should allege certain subscribers in default.⁹ The question might be asked, How is he to know who are in default? If the association of subscribers has been incorporated, it seems the contractor may not have a mechanic's lien on the joint property for the balance of the price for work done under contract with the subscribers¹⁰ unless it can be shown that the corporation adopted the contract of its promoters.¹⁰

The payee named in the subscription may maintain an action, as can any-

¹ *Holmes v. Higgins*, 1 B. & Caldwell 74 [1822].

² *Parsons Partnership*, 46-7; *Shibley v. Angel*, 37 N. Y. 626 [1868]; *Fuller v. Rome*, 57 N. Y. 23 [1874].

³ *Davis v. McMillan* (Ind. App.), 41 N. E. Rep. 851.

⁴ 24 Amer. & Eng. Ency. Law 335; *Davis v. Ravenna C. Co.* (Neb.), 67 N. W. Rep. 436.

⁵ *Davis, etc., Manufg. Co. v. Jones* (C. C. A.), 66 Fed. Rep. 124; *Davis Co. v. McKinney* (Ind. App.), 38 N. E. Rep. 1093.

⁶ *Davis v. Hendrix*, 1 Mo. App. Rep. 41.

⁷ *Davis v. Campbell* (Ia.), 61 N. W. Rep. 1053.

⁸ *Davis v. McMillan* (Ind. App.), 41 N. E. Rep. 851.

⁹ *Davis v. Ravenna C. Co.* (Neb.), 67 N. W. Rep. 436; *semble Clayton v. Newton Academy*, 95 N. Car. 298.

¹⁰ *Pittsburg & T. C. Co. v. Quintrell* (Tenn.), 20 S. W. Rep. 248; *Weatherford, etc., R. Co. v. Granger* (Tex.), 22 S. W. Rep. 70.

body selected to receive the money in the manner required by the terms of the paper.¹ If no person, committee, or board is designated in the paper the payment may be enforced in the name of the remaining subscribers, or by the association as a body, or by a building committee appointed by the association.² If the subscription paper stipulate that the sums subscribed would be paid to any person who would erect a structure it is like a note payable to bearer, and the subscriptions may be collected by any one who builds in accordance with the specifications of the paper.³ If the association has been legally incorporated the action should be in the name of the corporation.⁴ If one of the subscribers has been authorized to act for the others and has incurred expense or advanced money on the faith of the subscriptions he may sue other subscribers refusing to pay and in his own name. Such is the case where one has acted as superintendent or a contractor and carried out the plan contemplated. A good illustration is afforded in a case where a college class at a class meeting voted to publish a class-book, the members voting or assenting to the vote were held personally liable for the expense, at the suit of one who printed it, under a contract with a member of the class elected business manager of the publication.⁵ Agreements by subscribers to pay a person their respective subscriptions upon the erection by him of a certain structure may be enforced when the structure has been completed, even though the subscribers among themselves have not performed their mutual agreements.⁶

Subscribers are bound by stipulations and conditions contained in the subscription paper, and none other can be shown in contradiction to them. The subscriber cannot go outside the written contract to show different terms,⁷ such as misrepresentations, not incorporated in the subscription paper.⁸ In the absence of fraud, parol evidence is not admissible to show that the subscriptions were not to be payable except on certain other conditions not mentioned in the subscription paper. Thus it cannot be shown that certain materials were to be used in a building to be built out of the fund subscribed,⁹ or that the contract was to be let to the lowest bidder,¹⁰ or that the structure was to be completed by a certain date.¹¹

50. Second Party Not Named, but Determined by His Own Act.—In many cases the contractor or second party to the contract who is to perform or who has performed the consideration is not named in the offer, but anybody who may accept the offer or perform the consideration may become the contractor. Such contracts are those created by the performance of the

¹ 24 Amer. & Eng. Ency. Law 339.

² 34 Amer. & Eng. Ency. Law, 339, 340.

³ Cooper v. McCrimmin, 33 Tex. 383.

⁴ Wilcox v. Arnold (Mass.), 39 N. E. Rep. 414.

⁵ Davis v. Johnson, 49 Mo. App. 240.

⁶ 34 Amer. & Eng. Ency. Law 341.

⁷ Gerner v. Church (Neb.), 62 N. W. Rep. 51.

⁸ Cooper v. McCrimmin, 33 Tex. 387.

⁹ Miller v. Preston, 4 N. Mex. 314; and see McCormack v. Reece, 8 Green (La.) 591.

* See Secs. 122-131, *infra*.

consideration stipulated, as by the apprehension and arrest of a criminal under a public offer of a reward, or by being the highest bidder at an auction sale, or the lowest bidder for the performance of public works. To become a party to such a contract the person must bring himself strictly within the terms and conditions of the offer, or the rules and regulations prescribed at the sale or in the advertisement for bids or proposals. In accepting an offer of reward a person must know of the offer, and perform the consideration with such knowledge, to become a party to the contract. In auction sales, as in bidding for contract work, the contractor becomes the offerer; and if the sale is "without reserve" or the letting absolutely to the lowest bidder, then his becoming a party to the contract depends upon whether he is the highest bidder in the former case and the lowest bidder in the latter case. The fact that his offer is the highest in the one case or the lowest in the other case does not make him a party to the contract, but it gives him a right to a contract. To become a party to a contract the offer of the bidder must be accepted either by the auctioneer knocking down the goods, or by the formal acceptance of the proposal, as by awarding the contract to the lowest bidder.

The subject of proposals and lowest bidder is of special interest to readers engaged in construction work. Considerable space has been given to the subject in Chapter VI. The custom of letting contracts to the lowest bidder, which is so universal in public work, has been prolific of law-suits. The large amount of money involved and the desire on the part of men in office to reward their constituents have promoted sharp practice of every color and design. Therefore such contracts receive the closest surveillance of the court when they come before it, and in consequence thereof the law regarding contracts to lowest bidders is pretty well determined.

51. Charter and Statute Requirements Must be Strictly Carried Out.—

Where directions and proceedings are prescribed by which the corporation is to let the contract or conduct the work, these directions and instructions are imperative, and any neglect or deviation from them will be fatal to the validity of the contract.¹ In an act which declared that a board of public works "may" advertise for proposals and the contract be given to the lowest bidder the court declared that the word "may" must be construed to mean "shall."² The illegality of the contract may be asserted by any party or interest.³

When it was left discretionary with commissioners to employ their own labor and purchase their own materials and construct waterworks, or they

¹ Sedgewick on Const. and Stat. Law 268-278; *Henderson v. United States Ct. of Claims*, Dec. Term, 1868, *per* Casey, C.J., pp. 75-83.

² *McBrian v. Grand Rapids*, 56 Mich. 95; and *see Santa Cruz Co. v. Heaton* (Cal.), 38

Pac. Rep. 693.

³ *Knapp v. Swany*, 56 Mich. 345; *Dillon's Munic. Corps*, § 383; *Green's Brice's Ultra Vires* 43; *Elmira Gas Co. v. Elmira*, 2 Alb. L. J. 392; *Randolph Co. v. Jones*, 1 Breese (Ill.) 103.

could let the work or portions of the work by contract, it was held that, having elected to do the work by contract, they must let the contract strictly as provided by law, and material deviations from the methods imposed rendered the contract void and the contractor without remedy.¹ Such legislative acts are not directory but imperative in their requirements, and when a statute or charter declares that work is to be advertised, plans and specifications prepared and published, bids invited, and the contract awarded to the lowest bidder it is a formality that cannot be dispensed with.²*

52. No Recovery can be Had for Work and Materials Furnished for Public Work Contrary to Law.—Any irregularity, gross mistake, fraud and collusion, or any circumstance that tends to foster favoritism or to prevent fair and honest competition, may suffice to render the contract void and to deprive the contractor of any returns for his labor or materials. This must necessarily work great hardships to a contractor, it is imposing upon him great burdens to ascertain and watch the deliberations of a board or city council; it is impossible to ascertain the mistakes and collusions of their officers and agents;—but the courts maintain that, though the law may work hardships, it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which, through improper combinations and collusions, might be turned to the detriment or injury of the public.³ This rule may seem unjust to a contractor who, without having considered whether the law has been complied with or not, has performed labor and furnished materials for a public corporation, and expects compensation therefor, the same as if they had been done or furnished for a private individual. But, nevertheless, the authorities hold that a contractor when dealing in a manner expressly provided by law must see to it that the law is complied with. Where work is done for a city without authority the fact that the city is benefited thereby does not establish its liability to pay for it.⁴

53. The Law will Not Imply a Contract which the Law Forbids.—The *general* doctrine unquestionably is that when one receives the benefit of another's work or property he is bound to pay for the same, and this doctrine applies as well to corporations as to individuals in cases where there is no restriction imposed by law upon the corporation against making in direct terms a contract like the one sought to be implied;⁵ but where there exist legal restrictions which disable a corporation from agreeing in

¹ *Dickinson v. City of Poughkeepsie*, 75 N. Y. 65.

² *Davison v. Gill*, 1 East 64-71; *People v. Allen*, 6 Wend. 486; *Briggs v. Georgia*, 15 Vern. 72.

³ *Whiteside v. United States*, 93 U. S. 247-257 [1876]; *Hawkins v. United States*,

96 U. S. 691 [1877]; *Nash v. St. Paul*, 11 Minn. 174 [1866]; *Burrell v. Boston (Mass.)*, 2 Clifford 590 [1867].

⁴ *Springfield M. Co. v. Lane Co.*, 5 Oreg. 265.

⁵ *Cases collected*, 29 Amer. & Eng. Ency. Law 864.

* See Chap. VI, Sec. 138, *infra*.

express terms to pay money the law will not imply any such agreement against the corporation.¹ The law is based upon motives of economy, and originated perhaps in some degree from distrust of officers to whom the duty of making contracts for public work was committed. If contractors were allowed to recover the reasonable value of their work, or were allowed compensation to the extent that the corporation is benefited, it would afford a means of evading the law. Contractors could combine, conspire to not bid against one another, bribe public officers to accept their proposals, and if detected recover the reasonable value of their work and materials, and thus defeat the very object of the statute.²* No implied contract can be inferred from the fact that the structure is subsequently used by the public.³

Attempts have been made to give detailed estimates of the kinds and quantities of materials and work required, and to omit from the specifications and plans such materials and work as may be encountered that would greatly increase the cost and which are difficult to determine in advance, it being the intention to have such work done by outside parties or by the contractor at a reasonable price. Such materials are hard-pan, rock, and quicksand. If under the statute contracts can only be let to the lowest responsible bidder, then no other manner of contracting can be legal, and any bid or contract which leaves the payment for a substantial part of the improvement contemplated, either in work or material, to private agreement, is contrary to express provisions of law, and void.⁴ It seems that if the extent of such extra work and material cannot possibly be ascertained in advance, even approximately, it may be proper to mention such contingencies in the specifications and contract and to provide for payment for such extraordinary contingencies at what the extra work is reasonably worth; by measure or weight, as per cubic yard or per ton; but such a course can never be necessary where, by the exercise of reasonable diligence and suitable investigation by the city surveyor or other proper official, the condition of things affecting the cost of construction can be ascertained beforehand. It can be justified only when the true condition of things cannot be ascertained.⁵ If a partial compliance were sanctioned, then there would be no safeguard to the public interests in the requirements of the statute. If a part of a contract be exempted from the force of the law, a small and comparatively unimportant portion of the work might be advertised and com-

¹ *Brady v. The Mayor*, 2 Bosworth 173; *Zottman v. San Francisco*, 20 Cal. 102-105; *Springfield Milling Co. v. Lane Co.*, 5 Oregon 265 [1874]; *Berlin Iron Bridge Co. v. San Antonio*, 62 Fed. Rep. 882.

² *Bare v. Village of G.* 72 N. Y. 463-472; *McBrien v. Grand Rapids*, 56 Mich. 95.

³ *Taft v. Montague*, 14 Mass. 281, *a street*; *McDonald v. Mayor*, 68 N. Y. 23; *Davis v. School District*, 24 Me. 349;

Pratt v. Swanton, 15 Vt. 147; *Murphy v. Albina (Oreg.)*, 29 Pac. Rep. 355 [1892]; *Welson v. School District*, 32 N. H. 118; 1 Dill. Mun. Corp., § 464; *many cases in* 15 Am. r. & Eng. Ency. Law 1084-5.

⁴ *McBrien v. Grand Rapids*, 56 Mich. 95.

⁵ *Parr v. Village of Greenbush*, 112 N. Y. 246 [1889]; *Brady v. Mayor of New York*, 20 N. Y. 317-318; *McBrien v. Grand Rapids*, 56 Mich. 95.

* See Sec. 43 and Secs. 136-140, *infra*.

petition invited, and the great bulk be left to private agreement between public officers and the contractor.¹ *

It is thought advisable to mention some cases of interest to engineers and contractors in which contracts have been held void and inoperative. The books are full of cases where, contrary to law, contracts have been awarded to parties who were not the lowest bidders, and it is fully established that the contract in such a case is void, and that the contractor cannot recover for work done or materials furnished. †

54. Irregularities Need Not be Caused by Contractor.—Irregularities in awarding the contract, though not encouraged or solicited by the contractor, may destroy the validity of the contract when subsequently discovered. Thus where one of the competitors in bidding for a public work was permitted by the engineer, to whom the proposals were referred for calculation and comparison, to alter his bid so as to make it appear lower than that of the others, and then after the acceptance of his bid, a contract was made at different prices, and with material clauses inserted, not contemplated or offered the other bidders; it was held that the contract was unauthorized and void, and, further, that no recovery could be had for the work performed.² The misfortunes of the contractor are thus augmented when it lies in the power of a dishonest or careless engineer to render his contract invalid. It has been so held when an engineer has been negligent, dishonest, or collusive in his estimates, and it turned out that the successful bidder was not the lowest bidder, that the law was not complied with, and that there was no basis for a valid contract.³

The facts of the case cited, briefly stated, are that the estimate of the engineer proved no better than a random guess, and, like such cases, was far from being correct. The engineer reported the quantities as 10,000 cubic yards of earth and 20,000 cubic yards of rock, and the successful contractor bid \$1.62½ for earth and 2 cents for rock excavation, and in comparison with others he was the lowest bidder. As it turned out, there were about 20,000 cubic yards of earth and 10,000 cubic yards of rock, which made him one of the highest instead of the lowest bidder. The contractor cleared about \$12,000, or 20 to 30 per cent. above the fair value of the work. The court said that such an estimate, in connection with a bid of five times the actual cost of earthworks and less than 1½ per cent. of actual cost of rock excavation, was enough to show on its face that the contract was the result of fraud and collusion.²

To engineers and contractors this estimate and bid may not seem so extraordinary nor such clear evidence of fraud. When it is considered that no appropriation or other provision had been made for engineering investi-

¹ *McBrien v. Grand Rapids*, 56 Mich. 95.

² *Dickinson v. City of P.*, 75 N. Y. 65.

* See Chap. VI, Secs. 136-150, *infra*.

³ *In re Anderson*, 109 N. Y. 554.

† See Secs. 132-199, *infra*.

gation, and that no tests whatever were made before letting the work to ascertain the quantities of rock and earth respectively, the estimate is not so extraordinary. And men of experience engaged in construction know that facilities for undertaking and handling work, the co-operation of contractors, the joint performance of two dependent jobs, in which the work done upon one counts upon the other, would all tend to make a wide difference in the prices bid. For earth that must be hauled to the limits of a city or to distant dumping-grounds they would require a good price, while other contractors who have contracts for filling an adjoining lot at a good figure would be glad to secure the earth for the digging; and likewise with rock, contractors who had immediate use for stone in the vicinity could excavate or quarry it at a mere nominal price. Whether such conditions existed is not known, but to an engineer the facts related would alone hardly be conclusive evidence of fraud. If, however, there had been a *bona fide* effort to comply with the ordinance, and there had been an honest mistake or error as to the quantities, the case would have been decided differently.¹

In a more recent case in the same state, with almost precisely the same facts and circumstances, it was held,—that the contract was binding; that, though the contractor in making his bid knew that the estimate misstated certain items, and, in bad faith and with intent to profit by the ignorance of the engineer, made an unbalanced bid, yet, there being no fraudulent collusion between him and the engineer or other officer of the corporation, he was entitled to recover, and had a right to the benefit of his own knowledge, honestly acquired, so long as he did nothing to mislead or deceive the city. It was held that the validity of such a contract did not depend upon the accuracy of the officer charged with the duty of making the estimates, but upon an honest effort on his part to be accurate; that the lowest bidder under the estimates is the lowest bidder under the law; that the city could not hold the contractor to a performance and then annul the contract because the accurate result so varied from the estimates as to make the accepted bidder higher than the others.²

The decision in this case, it is thought, will better meet the views of engineers and contractors, but it does not overrule the preceding case; and if the officers of a corporation have acted dishonestly, collusively, or even negligently, in express violation of the statute or ordinance, the contract may be declared void.³

In another case, in which the prices for curbing and guttering were about four times those of other bidders, and the bid offered to do flagging for nothing, which was the largest portion of the expense, the case was

¹ *In re* Anderson, 109 N. Y. 554.

² *Accord* McMullen v. Hoffman (C. C.).

³ *Reilly v. Mayor, etc., of N. Y.*, 111 N. Y. 473.

75 Fed. Rep. 547.

regarded as free from fraud, and it was held that the prices alone were not sufficient reason for declaring the contract invalid.¹

55. Precautions to be Taken by Contractors with Regard to Parties and Their Powers.—In conclusion it is submitted that when a contract is made and entered into "by and through commissioners or boards of public works, government or city officers or engineers, or agents of a public corporation" it is imperative that the parties study the act or statute to which the corporation or board owes its existence; that the constitutionality of the act be considered; that the charter granted be consulted to see that the powers and privileges of the corporation comprehend the proposed improvement; that the deliberations and actions of the city council or board have been legal and constitutional and within the strict interpretation of the act; that the indebtedness limited by the act has not been exceeded, nor the appropriation been exhausted; that the power to make and enter into contracts has not been specifically given by the act to some particular officer, and that it is a power that can be delegated; that the officer or agent who assumes to act has been duly appointed, elected, and authorized to act on behalf of the corporation or board; that his acts are within the authority so delegated or bestowed; that such officer or engineer has in honesty and in good faith performed his duties according to law; that the work itself is not forbidden by statute, ordinance, or public policy; and finally that the property upon which the work is to be performed has been acquired, accepted, or condemned pursuant to the powers given and the laws governing the corporation. Then, and only then, can a contractor feel secure in the prosecution of his work and that he will be rewarded for his labors.

56. Source of Power.—"By virtue of the power vested in him [them]," etc.* The importance of this clause must be evident from what has preceded. Every opportunity should be given the contractor to investigate the conditions under which he enters into the contract, and to inquire into the legality of his undertakings.

57. Residence of Parties—Place Where Contract is Executed.—"By and between.....of the City of..... County of..... State of....." Here should be inserted the full name of the person, partnership, or corporation that assumes to act and be responsible for the performance or execution of the works undertaken. The contract should give the full and correct name under which the parties do business if a partnership, and if a corporation the precise title under which it was incorporated.

58. Laws Governing Contract May be Determined by the Place Where Contract was Made or by the Residence of the Parties.—It is important that the residence of the parties be given. Corporations should be described

¹ Matter of N. Y. P. E. P. S., 75 N. Y. 324 [1878].

* See Sec. 29, *supra*.

very carefully, as the question of jurisdiction to which they belong is an important one in serving notices, bringing suits, and in all legal proceedings. The personal ability or disability of a party to make a contract is often decided by the law of the party's domicile,¹ and the validity of an assignment for the benefit of creditors is tested by the law of the assignor's domicile.² The law of the owner's domicile determines whether his property is real or personal, as well as the right to its possession and the validity of its transfer.³ The residence of the parties, the place in which the contract is executed and delivered, and the location of the subject-matter of the contract or the place of performance may one and all have much to do in determining the validity, interpretation, enforcement, etc., of the contract, and the customs and usages under which the work shall be executed and paid for. The law that *should* govern is the law by which the parties *intended* to be governed, and if that be expressed it *will* govern. If it be not expressed, then there are certain presumptions which are conclusive of the parties' intention. These are: 1. "That an agreement to perform an act in a certain place is made in reference to the law of that place. 2. That an agreement to perform an act without designating a place for performance is presumed to be made with reference to the law of the place at which the agreement was made." If it appear from the face of a contract made in one place that it is to be performed in another place its validity, nature, obligation, and interpretation will be determined by the law of the place of performance, but not its legality, it seems.⁴ If no place of performance is designated in the contract, or it may be performed anywhere, it will be governed by the law of the place where it was made.⁵ A contract made in one state to be performed partly in that state and partly in other states will be governed by the law of the place where made;⁶ but when a contract was made in one state for a building to be erected in another state the law of the state where the contract was performed—*i. e.*, the house built—held with regard to mechanics' liens.⁷ In building and construction contracts the place of performance is usually named in the description of the subject-matter, the site or locality; but whether the rule will hold hard and fast may be doubted, for many exceptions and contrary decisions have arisen under the conflict of laws of different places. If the full intention of the parties cannot be ascertained from the contract, the custom or usage of the place where the contract was made may be shown to assist in its interpretation. If free from obscurity the intention as expressed will hold unless it be proved that the

¹ *Matthews v. Murcheson*, 17 Fed. Rep. 760 [1883]; *Spearman v. Ward*, 8 Atl. Rep. 430; 3 Amer. & Eng. Ency. Law 573.

² 3 Amer. & Eng. Ency. Law 573.

³ 3 Amer. & Eng. Ency. Law 574.

⁴ *Brown v. Amer. Finance Co.*, 31 Fed. Rep. 516; *West. Un. Tel. Co. v. Eubank* (Ky.), 38 S. W. Rep. 1068.

⁵ 3 Amer. & Eng. Ency. Law 544, 561-2; *Bauk v. Hall* (Pa.), 24 Atl. Rep. 665; *accord* *Leake's Digest of the Law of Contracts* 207; *Cartwright v. Railroad Co.* (Vt.), 9 Atl. Rep. 370 [1887].

⁶ 3 Amer. & Eng. Ency. Law 560.

⁷ *Barber v. Carnie*, 44 N. J. Law 208; *Thurman v. Kyle*, 71 Ga. 628.

interpretation would be different according to the law of the place where the contract was executed.¹ When it is not clear that the contract is to be performed in a place designated, it is a general rule that the rate of interest, the penalties of usury, the ceremonies to be performed, such as those required by the registry laws, the statute of frauds, and special statutes pertaining to the subject-matter, all depend upon the laws of the place where the contract is drawn, signed, and delivered, or where it is purported to have been entered into. It is often said that if a contract is valid and binding where made, it is valid and binding everywhere, and if void or illegal where made, it is generally held void and illegal everywhere else.² This is generally so unless the contract is contrary to good morals or repugnant to the policy of the state where it is to be enforced.³ A contract that is valid when made is not affected by a change in the public policy of the state;⁴ and it has been held that where a contract is valid at the time when it is sought to be enforced the fact that it was against public policy when made, is immaterial.⁵ The operation of a contract and the rights of the parties under it, so far as such rights depend upon the construction and validity of the agreement or on questions of sufficiency of performance, are governed by the laws of the place where the suit is brought,⁶ as are also questions of the remedy to be allowed and the manner of enforcing the contract. A discharge of a contract by the law of the place where it was made is generally held a discharge everywhere; but a discharge by the law of a place where it was not made or to be performed will not be a discharge of it in other countries.⁷ All suits must be brought within the time prescribed by the statute of limitations which prevails in the place where the action is brought, yet the law of the place where the contract was made may limit the time in which a suit may be brought, for no action can be brought in another place where a greater length of time is allowed or where there is no limitation at all.⁸ The place of contract is not the place where a note or bill is made, drawn, or dated, but the place where it is delivered from drawer to drawee, from promisor to payee, from indorser to indorsee.⁹ A contract is made and determined by the place in which it was completed. Therefore a contract made by a traveling agent which required ratification by his employer was deemed to have been made at the place where the ratification was given.¹⁰

The author has dwelt upon this subject to show the necessity of describing the parties, their residence, and the place where the contract is entered into and to be performed, more than for the purpose of explaining the laws by

¹ 3 Amer. & Eng. Ency. Law 561.

² *Winter v. Baker*, 50 Barb. 432 [1867];

³ 3 Amer. & Eng. Ency. Law 552-3.

⁴ 3 Amer. & Eng. Ency. Law 554; *Union Locomo. Exp. Co. v. Erie Ry. Co.*, 37 N. J. Law 23 [1873].

⁵ *Stephens v. Southern Pac. Co. (Cal.)*, 41 Pac. Rep. 783.

⁶ *Hartford Fire Ins. Co. v. Chicago, M.*

& St. P. Ry. Co. (C. C.), 62 Fed. Rep. 904.

⁷ 3 Amer. & Eng. Ency. Law 575.

⁸ 3 Amer. & Eng. Ency. Law 581-2.

⁹ 3 Amer. & Eng. Ency. Law 583-4. See other cases cited.

¹⁰ *Overton v. Bolton*, 9 Heiskell 762 [1872].

¹¹ *Schuenfeldt v. Junkerman*, 20 Fed. Rep. 357 [1884].

which the contract will be governed. To do the latter in a few pages or even chapters would be out of the question, for it embraces the whole subject of conflict of laws, one of the most confused and perplexing subjects in the study of law.

59. Time When Contract was Made or Entered Into—Day or Date.—

Of equal importance is the date of a contract, which is usually inserted in the following phrase: "*This.....day of.....in the year.....*" Every engineering, as well as legal, document or memorandum should be correctly dated, so much often depends upon the day on which it was made. The validity, enforcement, and time of completion of a contract are sometimes determined by the day or hour when it was delivered. If a longer period than that fixed by law has elapsed since its breach or execution both parties' rights may have been forfeited, and the contract be dead and worthless. This suggests the question as to what completes the contract, or at what time does it become binding. A written contract or specialty is not binding until delivered.¹ It has therefore frequently been held that a deed or bond or note signed on Sunday,² but delivered on some other day of the week, is valid and binding, since such instruments take effect from the time of delivery; and the deed may have been acknowledged on Sunday.³ The same has been held of other contracts in writing, as an order for goods⁴ written and signed on Sunday, but dated, delivered, and filed on a secular day; a contract to finish a court-house signed by one party on Sunday.⁵ To render a contract void because made on Sunday it must have been closed or perfected on that day.⁶ The fact that negotiations leading up to the contract took place, or that terms were agreed upon, on Sunday does not render the contract invalid if it were completed on a week-day.⁷ On the other hand a proposition of purchase and sale made on a week-day, but completed and delivered on Sunday, is void.⁸

If a contract *must* be made upon a Sunday or legal holiday the terms may be agreed upon, the instrument drafted, signed, sealed, and acknowledged on Sunday, and then delivered upon some succeeding day not a holiday, postdating the contract to agree with the date of delivery. It seems that the contract cannot be delivered on Sunday to another as an agent to deliver upon a week-day, for when a note was signed by two makers on Sunday and delivered by one only on a week-day it was held not to bind the other signer, as he could not authorize a delivery on Sunday.⁹ Under such a law it would seem legally proper for the party who could not

¹ *McFarland v. Sikes* (Conn.), 3 N. E. Rep. 253.

² 24 Amer. & Eng. Ency. Law 555, 566, and cases cited.

³ 24 Amer. & Eng. Ency. Law 555, note.

⁴ *Cameron v. Peck*, 37 Conn. 556.

⁵ *Behan v. Ohio*, 75 Tex. 87.

⁶ *Foster v. Worten*, 67 Miss. 540; *Moseley v. Van Hoser*, 6 Lea (Tenn.) 286.

⁷ Cases in 24 Amer. & Eng. Ency. Law 566.

⁸ *Smith v. Foster*, 41 N. H. 220.

⁹ *Bishop on Contracts* (Eng. ed.) § 544; *Davis v. Barger*, 57 Ind. 54; and other cases cited in 24 Amer. & Eng. Ency. Law 566.

be present on a day following, to take his copy of the contract with him, and to make a delivery to the other party by messenger, express, or through the post-office.

In some jurisdictions contracts made on Sunday, and therefore invalid, may be ratified on some succeeding week-day;¹ but there are many cases that hold that the ratification must amount to the making of a new contract. The diversity of opinions is due to the different statutes of the states, and to the view that the courts have taken of Sunday contracts.

It is suggested that courts will have little sympathy with contracts made and executed on Sunday, inasmuch that in nearly all Christian countries and states all labor and business are required to be laid aside on the Sabbath except such work as is *necessary* or is an act of charity, and parties who deliberately transgress the law will have little consideration when they seek the law's protection. The courts therefore frequently refuse to have anything to do with cases where Sunday contracts have been made, holding that the party complaining is as bad as the one complained of, denying either party any rights under the contract, and leaving the parties where their illegal transaction has put them.

As to what is necessary construction-work, there are few cases reported in the books. If property be exposed to imminent danger or peril it is work of necessity to preserve it.² It has therefore been held proper to gather and handle grain, hay, sap, etc., on Sunday that were liable to spoil or be damaged, and to save logs scattered by storm. A flow of two barrels of salt water a day into an oil-well was held not so injurious that it would make the pumping of it out on Sunday necessary work, and relieve the operator from the penalty imposed by the Sunday law.³ Repairs to a mill,⁴ as the cleaning out of a wheel-pit, on Sunday, so as to prevent stopping on week-days, and thereby shutting down a mill employing many hands, was held not a work of necessity.⁵ It has been held that a contractor was not chargeable with negligence for refusing to work on Sunday when by so doing and constructing a sewer he could have avoided injury to a brick wall.⁶

One is not safe in undertaking any work on Sunday that can as well be done on a week-day.⁷ The fact that a creditor wished to go away immediately does not make it necessary to sign, deliver, or accept on Sunday an order to pay the debt.⁸ If one contract to serve another in Alaska, and to give his whole time, attention, capacity, and energy to the business, and to work as directed, at all times, at any place, Sundays and holidays not ex-

¹ 24 Amer. & Eng. Ency. Law 561, 570, 571.

² *Parmalee v. Wilks*, 22 Barb. (N. Y.) 540.

³ *Com. v. Funk*, 9 Pa. Co. Ct. Rep. 277.

⁴ *Hamilton v. Austin*, 62 N. H. 575.

⁵ *McGrath v. Merwin*, 112 Mass. 467.

⁶ *Oleson v. City of Plattsmouth* (Neb.), 52 N. W. Rep. 848.

⁷ *Bucher v. Fitchburg R. Co.*, 131 Mass. 156, 125 U. S. 555; *Holcomb v. Danby*, 51 Vt. 428.

⁸ *Mace v. Putnam*, 71 Me. 238; and see *Meader v. White*, 66 Me. 90.

cepted, he may be required to work on Sundays, and may be discharged for refusing to do so.¹

If a contract be not dated, the day on which it was made and entered into and delivered may be proved by evidence. The omission of the date is not fatal to the validity of a simple contract, nor of a deed, though it may affect the negotiability of a bill or note.² If an instrument be dated the date inserted will be regarded as the true date unless otherwise proven.³

¹ *Nelson v. Pyramid H. P. Co.* (Wash.), 80 Pac. Rep. 1096; *other cases accord and contra* in 24 Amer. & Eng. Ency. Law 559.

² 5 Amer. & Eng. Ency. Law 77.

³ *See* 5 Amer. & Eng. Ency. Law 80, 81-92.

CHAPTER II.

LAW OF CONTRACTS. ESSENTIAL ELEMENTS OF A CONTRACT. THE CONSIDERATION.

THE THING FOR WHICH THE ACT IS DONE. CONTRACTOR CONSENTS TO DO SOME LAWFUL ACT: FOR WHAT?

60. The Consideration.—An undertaking or agreement is not a contract that can be enforced in our courts of law unless it has been made or assumed for a consideration. There must be a clear understanding between the parties, and there must be some consideration for the obligations assumed by both parties, something given in exchange for the obligation, that, in the theory of the law at least, is commensurate with the obligation undertaken.¹ The law will not permit a person to assume contract obligations for nothing. There must be something given in exchange, and that something, so far as it is the policy of the law to judge, must be legally equivalent to the obligation assumed.

The consideration of a contract may be described as that which either party suffers, surrenders, gives, does, or refrains from doing, or promises or pledges, for the obligation which he receives in return from the other party. It may be that which is given or promised by one party for that which is received or undertaken or relinquished by the other party. The consideration may consist of some right, profit, interest, or benefit accruing to one party, or it may be some forbearance, detriment, loss, or responsibility endured, suffered, or undertaken by the other party. The thing given or surrendered may be any material thing of value, as money, an act, a right, or a privilege, or it may be simply a promise or an undertaking for a consideration of value. There must be some undertaking or obligation assumed or there is no contract; a mere exchange of two articles of value is not a contract.

61. As Regards Consideration.—The act undertaken or the promise given may be in consideration of something given, or of a promise to give, to pay, or to do something, or to refrain from doing something. The consideration may be a benefit to the one to whom it moves or is promised, or a detriment to the one who furnishes it. Detriment may be simply the doing of a thing which the party is not bound to do, and does not necessarily

¹ Langdell's Summary of Contracts 1017.

mean injury. There may be a clear benefit to a promisor, and yet no consideration—for example where the benefit does not come from the promisee. Detriment to the promisee is a universal test of the sufficiency of consideration, and every consideration must possess this quality. If there is detriment to the promisee it does not matter whether there is benefit to the promisor or not. The consideration may inure to the benefit of the promisor or of some third person, or to the benefit of nobody. Consideration therefore means rather that the promisee suffers detriment more than that the promisor is benefited.¹ The detriment must be a detriment from entering into the contract, not from the breach of it.² In legal contemplation the promise is always given and received in exchange for the consideration, and for no other purpose. A promise can never constitute a gift from the promisor to the promisee.

62. Consideration in Case of Subscriptions.—From what has been said a natural conclusion would be that gratuitous subscriptions to promote a common object were not binding. Many engineering and architectural schemes are promoted by the concerted action of public-spirited citizens, whose ardor is less warm when it comes to paying their subscriptions than when they made them. To the contractors and engineers who have undertaken to carry out their plans it is a matter of much moment whether they can collect anything for their time, labor, and materials.*

Where several persons sign a subscription paper, each agreeing to pay a certain amount towards an enterprise in which all are interested, the promise of each may be held a good consideration for the promise of the others. This may be a consideration for a binding contract between the subscribers, but it is not a consideration as between the subscribers and one who is not a subscriber, but who has furnished the means to carry out the enterprise for which the subscriptions were made.

If the subscription is for a designated purpose, and a contractor is invited to carry out the conditions stipulated in the subscription paper, which he has done, or if on the faith of the subscriptions he has expended money or assumed liability, an acceptance of the offer of the subscribers will be implied, and the contractor may collect from the subscribers. In the absence of the above circumstances the subscription is a mere offer and cannot be enforced. If an offer merely it may be revoked at any time before the consideration and conditions have been performed. A gratuitous subscription with only one signature is but an offer which, until accepted by the promisee in express terms or by a performance of the conditions stipulated therein, is without a consideration, and cannot be enforced against the will of the subscriber. Doubtless, however, *the law* would imply a contract to reimburse the contractor for the amount he had expended. Cer-

¹Currie v. Misa, L. R. 10 Ex. 162; Langdell's Summary of Contracts 1023.

²Ridgway v. Grace (Com. Pl.), 21 N. Y. Supp. 934.

* See Parties, Secs. 48, 49, *supra*.

tainly it is well settled that when a contractor to whom the subscriptions run has performed his part or has incurred obligations on the faith of such subscriptions, and has complied with the conditions on which they were made, the contract of each and all can be enforced.¹

63. Adequacy of Consideration.—The consideration must have some value, and the considerations moving from either party to the other party must be legally equivalent. In the absence of fraud the parties themselves are left to judge of the relative value of the considerations which they furnish or pledge, but if the agreement be such that the consideration cannot possibly be equivalent to the promise the contract will not hold.

The value of most considerations, as well as of most promises, is something which the law cannot measure; it is not merely a matter of fact, but a matter of opinion. If the parties think that the consideration is equal to the promise, or *vice versa*, and if they are willing to exchange one for the other, the consideration will be equal to the promise if the law can see that it has any value at all. Fifty cents cannot be a consideration to pay \$1 unconditionally and on request, *i. e.*, immediately. But \$1 is a sufficient consideration for a promise to pay \$1000 at some future day or upon the happening of some uncertain event, though the \$1 is only a sufficient consideration for a general or unqualified promise to pay \$1.² The smallest sum of money may be a sufficient consideration for a promise to acknowledge satisfaction of a judgment for the largest sum.³ So \$1 may be a consideration for a farm whose market value is \$5000, or \$1000 may be a consideration for so trivial a thing as a canary-bird.

The reasons for these discriminations are that the law has never abandoned the principle that the consideration must be commensurate with the obligation which is given in exchange for it, that though the smallest consideration will in most cases support the largest promise, this is only because the law shuts its eyes to the inequality. Any inequality to which the law cannot shut its eyes is fatal to the validity of the promise.⁴ Yet, though the most trivial thing may answer for a consideration, there must be *something*, for the court cannot disregard the fact that something and nothing are not equivalent. The inadequacy of the consideration must not be so gross as of itself to prove fraud or imposition.⁵ A promise to accept a part of a debt already due in payment of the whole if paid by a certain day is without consideration and void, for surely "a part cannot be equal to the whole."⁶

64. The Consideration of a Contract Must be Something More Than a Moral Obligation.—A mere moral obligation or duty is not regarded in law

¹ *Homan v. Steele*, 18 Neb. 653 [1886]; *Orman v. Buel* (Neb.), 59 N. W. Rep. 515; *Higert v. University*, 53 Ind. 326 [1876]; *Brownlee v. Lowe* (Ind.), 20 N. E. Rep. 301 [1889]; *Stearns v. Corbett*, 33 Mich. 458 [1876]; *but see* 24 Amer. & Eng. Ency. Law 328, *et seq.*

² Langdell's Summary of Cont. acts 1017.

³ Langdell's Summary 1017; *Emmet Co. v. Allen* (Ia.), 41 N. W. Rep. 201 [1889].

⁴ *Judy v. Louderman* (Ohio), 29 N. E. Rep. 181.

⁵ *Whitts v. Frenche et al.*, 19 N. J. Eq. 407 [1869].

of sufficient value to support a promise. A debt owing by a woman's dead husband which is barred by limitations is not such a consideration as will support an agreement by her to pay the amount of the debt.¹

There are what seem to be exceptions to the statement that a moral obligation will not support a promise. The cases of obligations which are not enforceable because of the infancy or bankruptcy of the promisor or because the right to an action is barred by the statute of limitations are often cited as such exceptions. In these cases the obligation is not regarded as having ceased to exist, but the law has given the party a defense which he may exercise or waive, and a new promise is held to operate as such a waiver. The action in such a case is not brought upon the new promise, but either upon the original obligation or upon one implied by law.² A promise to pay a debt which the creditor has by his own act effectually released is without consideration. A promise by a widow to perform a promise made by her while married is not binding without a new consideration in states where married women are under coverture.³ An obligation enforceable in equity will support an express promise to pay and make it suable at law.⁴ The moral duty of a father to provide for his child has been held a sufficient consideration for a promise to pay money.⁵

65. The Consideration Must Not be Wanting.⁶—If the thing to which the consideration relates has, contrary to the belief of the parties, no existence, the contract obligation will not hold. Thus materials sold that turn out to have been destroyed before the bargain was made is in fact no contract of sale.⁷ So if parties contract for a thing which they suppose to exist, but which in point of fact does not exist, the contract is void.⁸

66. The Doing of a Thing by One Party Which He is Already Bound to the Other Party to Do is Not a Consideration for a New Promise or a Contract.—A promise to pay a public officer an extra fee or a sum beyond that fixed by law is not binding, even though he renders services and exercises a degree of diligence greater than could have been required of him;⁹ but a contract by persons whose property was threatened by a mob to reimburse the sheriff for money expended by him for the wages and subsistence of special deputies is not void as against public policy so long as he exacts nothing for his own services or the services of his regular deputies.¹⁰

¹ *Sullivan v. Sullivan* (Cal.), 33 Pac. Rep. 862.

² Langdell's Summary of Contracts 1026.

³ 3 Amer. & Eng. Ency. Law 841.

⁴ *Condon v. Barr* (N. J.), 6 Atl. Rep. 614 [1886]; *Cameron v. Fowler*, 5 Hill (N. Y.) 306.

⁵ 3 Amer. & Eng. Ency. Law 840.

⁶ *Tife v. Blake* (Minn.), 38 N. W. Rep. 202.

⁷ Pollock on Contracts 441; *Bishop on Contracts*, § 70; *Rogers v. Walsh*, 12 Neb. 28; *Gibson v. Peikie*, 37 Mich. 380;

Hopkins v. Hinkley, 61 Md. 584; *Price v. Peper*, 13 Bush 42, *horse dead*. And the same is true of a house that has been burned. *Taylor v. Caldwell*, 3 B. & S. 826; *Walker v. Tacker*, 70 Ill. 527.

⁸ *Marion v. Bennett*, 8 Paige 312; *Mays v. Dwight*, 1 Norris (Pa.) 462; *Indianapolis v. McAvoy*, 86 Ind. 587.

⁹ *Decatur v. Virmillion*, 77 Ill. 315 [1875].

¹⁰ *McCandless v. Alleghany Bessemer Steel Co.* (Pa. Sup.), 25 Atl. Rep. 579.

A promise by the owner to pay additional compensation for the performance of a contract which the contractor is already under obligation to the promisor to perform is without consideration.¹ A promise by the contractor's surety, to whom the money to become due under the contract had been assigned, to pay the claim of a subcontractor if he would do certain work which he was required to do by his contract was held without consideration.² A promise by a building-contractor to put another coat of oil on the inside of a house, made after he had fully complied with his contract and without any additional consideration, is a mere gratuity, and his failure to put on the additional coat will not prevent him from recovering the full amount due under his contract.³ If the promise had been made before he had performed his contract it might have been different. When a construction company had completed work according to contract an agreement to accept less than the contract price was held without consideration and not to release the owner from liability for payment at the original contract rate.⁴ The same was held of an agreement of a subcontractor to sign a release of the contractor from personal liability in consideration that the owner would pay the former a past-due note.⁵ A promise to pay at a future time a debt already due, and which draws interest, is not a consideration for the extension of the time of payment when the rate of interest thereon is not changed.⁶

A promise by an owner to an architect to pay him a commission of 5 per cent. additional as an inducement to resume work upon a job for which he had agreed to furnish plans and to superintend is void, there being no consideration for the promise. The architect in this case had contracted to prepare the plans and to superintend the erection of a large brewery, but upon learning that a certain contract, which he had hoped himself to secure, had been given to another he became angry, took his plans, called off his superintendent, and refused to have anything more to do with the brewery. The facts of the case were that the architect took advantage of the owner's necessities and extorted a promise to pay him 5 per cent. as a balm for his feelings and as a condition for his complying with his contract already entered into. To permit one to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they might profit by their own wrongs.⁷

The principle seems to apply even when the promisee is under obligation to a third person to do the thing in question, for there is a conclusive presumption of law that the act is done in discharge of the previous obligation,

¹ *Jones v. Risley* (Tex. Sup.), 32 S. W. Rep. 1027.

² *Alley v. Turck* (Sup.), 40 N. Y. Supp. 433.

³ *Widiman v. Brown* (Mich.), 47 N. W. Rep. 231 [1890].

⁴ *Fitzgerald v. Fitzgerald & Mallory Const. Co.* (Neb.), 59 N. W. Rep. 838.

⁵ *McNutt v. Loney* (Pa. Sup.), 25 Atl. Rep. 1088; and see *McCarty v. Hampton Bldg. Assn.*, 61 Iowa 287, where an additional guaranty was exacted.

⁶ *Stickler v. Giles* (Wash.), 37 Pac. Rep. 293.

⁷ *Lingenfelder v. W. Brewery Co.* (Mo.), 15 S. W. Rep. 844 [1891].

and not as a consideration of a new and later promise.¹ So if a builder is under a contract to complete a house by a certain day and an outsider promises him a bonus if he will fulfill his contract the promise would be without a consideration. It would be otherwise, however, if the contract had been mutually rescinded or the contractor had good and sufficient reason for abandoning the work. A promise in consideration that he should complete it a day earlier than that required by his contract would be binding, and an extension of time by one party is a good consideration for the promise of another.²

A request by the owner of a building, that subcontractors stop work for the reason that the contractor had overdrawn his account and that he could get it done more cheaply, and a refusal on the part of the subcontractors, whereupon the owner told them to go ahead and to send the bill to him, but to make a reduction in the price if possible, was held to create a contract between the owner and subcontractors on sufficient consideration.³ An agreement of a construction company to commute its contract rate of compensation for finished work to a lower rate, because the work had not been completed as agreed, in consideration of which the other party consented to accept the work in its unfinished condition, affords a sufficient consideration to sustain the stipulated reduction.⁴

A contract to make an excavation at an agreed price, the contractor having examined the work before taking the contract, and having furnished proof that it was found more difficult than was supposed, which was disputed by disinterested witnesses, is insufficient to show consideration to uphold a promise to pay an additional price.⁵ An agreement to permit the contractor to retain twenty-five dollars already paid him above his expenses and to pay for the material furnished in consideration of the cancellation of the contract is not void for want of a consideration.⁶ A promise to pay for extra materials ordered by the architect, made before the work is completed, is founded on sufficient consideration as to materials already used, as well as those not used.⁷

67. The Consideration Must be Present.—The consideration must be present, *i. e.*, in legal contemplation the promise or undertaking must be assumed the moment the consideration is completely performed. This would seem to be necessary if the consideration is given in exchange for the promise. A past act performed without regard to any promise cannot be said to have been given in exchange for the promise, and a promise made for a

¹ Langdell's Summary of Contracts 1018.

² *Risley v. Smith*, 64 N. Y. 576 [1876], and cases cited.

³ *Yoeman v. Mueller*, 33 Mo. App. 343 [1889].

⁴ *Fitzgerald v. Fitzgerald & Mallory Const. Co. (Neb.)*, 59 N. W. Rep. 838.

⁵ *Casterton v. McIntire*, 23 N. Y. Supp. 301.

⁶ *Blagborne v. Hunger (Mich.)*, 59 N. W. Rep. 657.

⁷ *Irwin v. Locke (Colo.)*, 36 Pac. Rep. 898.

consideration already performed is simply a promise, without a consideration, and therefore cannot form an element of a binding contract. A promise made for a consideration to be thereafter performed, though invalid as a promise, may take effect as an offer and become binding if the consideration is performed before it is revoked or has ceased to exist.

A promise made in consideration of some future act must be distinguished from a promise given in exchange for *a promise to do* some future act.¹ In the former case the promise is in exchange for a future act, which is only an offer, while in the latter case the promise is in exchange for a present promise, and the promises themselves are the consideration, one for the other. When the consideration consists of performance the promise becomes binding when the act is performed. If an owner promise to pay a contractor a sum of money if he will do a particular act, and the contractor does the act, the promise thereupon becomes binding, though the contractor at the time did not engage to do the act.² A promise in consideration of some past or future act must be distinguished from a promise for or in consideration of *a promise* to perform some deed or work some time in the future, or of a promise made on account of some past act by which the party derived some benefit or the other party suffered detriment. In the former case the past or future act itself would not be a sufficient consideration, but in the latter case the present promise is a good consideration. Thus if an owner says to a builder: "I will pay you ten thousand dollars to build me a house," and the builder says: "All right," and the builder thereupon makes arrangements to build, it is not strictly an enforceable contract until the builder has built the house. The owner may revoke the offer any time before the builder has completed the house, *i. e.*, furnished the stipulated consideration; and the builder can have no action for the revocation, there being no express contract, though the law will imply a contract by the owner to pay the builder the reasonable value of what he has received or been benefited. But if the owner says: "I promise to pay you ten thousand dollars if you *promise* [agree] to build me a house, payment when house is completed," to which the builder agrees, then the contract is supported by a present consideration, *viz.*, the *promise* to build. So a promise to pay in consideration of some service rendered in the past, and not at the express or implied request of the promisor, is not binding.³

In all these cases if the owner is free to refuse or can return what he has benefited or been enriched by the labors of the contractor, and he does not return it, the law will imply a contract to pay for it what it is reasonably worth to him; but the contractor does not recover upon an express contract made by him with the owner, but upon the contract imposed by the law to promote justice and to prevent unjust enrichment. If the

¹ Langdell's Summary of Contracts, 1024

² Train v. Gold, 5 Pick (Mass.) 380-285.

³ 3 Amer. & Eng. Ency. Law 838; Stubb

v. Sweesy (Neb.), 67 N. W. Rep. 748;

Myers v. Dean (Com. Pl.), 32 N. Y. Supp. 237.

owner cannot restore what he has received he need not pay for it, as when a contractor has built a house upon the land of another without his knowledge or consent, or has built the house materially different from the one he contracted to build; there is no contract implied by law to pay for it, and the fact that the owner uses it and enjoys it does not add to his liability to pay for it.¹

If a part of the consideration is present and a part past it will support the promise or agreement.² Therefore when certain sums were subscribed to induce a contractor to complete the grading of a street begun under a contract with the city and in consideration of that agreement the contractor made a settlement with the city for the work then done and entered into engagements for its completion, which arrangements and expenditures he was not obliged to perform under his contract with the city, and which were necessarily productive of loss and injury in case of nonpayment, it was held that the consideration was amply sufficient to support an action for the amount pledged.³ A receipt in full by a subcontractor who claimed extra remuneration for extra work has been held a good consideration for a promise to pay for the same extra work if the promisor succeeded in getting an allowance for the same.⁴

68. From Whom Consideration Must Come.—The consideration of a contract must move from the person who receives the promise, *i. e.*, the promisee. If it does not, then the promise cannot be said to have been given in exchange for it, but as a gift, which is not binding on the promisor. Certain courts may and do allow persons for whose benefit the promise is made, *i. e.*, the beneficiaries, to sue on a contract; but, as Professor Langdell has said in his Summary, the consequence is that the promisor is then liable to two actions—one by the promisee and one by the beneficiary. In truth a promise to A to pay one hundred dollars to B confers no right upon B in law or equity, but *there are* similar cases in which B has been allowed to recover against the promisor.⁵

Therefore a third party was held not liable for the work of a contractor, because he told him, while the work was in progress, to go on and do the work ordered by the owner and he would pay for it; nor for the reason that the owner introduced the third party to the contractor as his partner and coadjutor in the work, and that he was shown what was being done in connection with the owner, and that he expressed great satisfaction and told the contractor to go on and do all that the owner ordered and he would pay for it. The promise was held voluntary and without consideration.⁶

¹ 3 Amer. & Eng. Ency. Law 839.

² *Cases in* 3 Amer. & Eng. Ency. Law 838.

³ *Corrigan v. Detsch*, 61 Mo. 290 [1875].

⁴ *Read v. Hitchins*, 71 Me. 590 [1880].

[However, it was not a very brilliant thing

on the part of the subcontractor to do unless required to do so to obtain the contract price.—Ed.]

⁵ 3 Amer. & Eng. Ency. Law 863.

⁶ *Stidham v. Sanford*, 36 N. Y. Sup. Ct. 341 [1873].

The principle is well illustrated in a case where the third party was a member of a committee to solicit aid towards the erection of a foundry-building, donated as an inducement for a foundry business to remove to a village where the third party resided. The third party had called upon an architect to solicit aid, at the same time telling him the purpose contemplated, and that whatever was done was to be a voluntary contribution. Under these circumstances, and without any express promise by the third party to pay him therefor, the architect prepared plans and specifications for the proposed building. It was held that to charge appellant for such plans an express promise to pay must be established, and such promise must have been made before the service was rendered; for if the work was not done on the credit of the third party, but for some other person, any subsequent express parol promise to pay for the same would be void as being a promise to pay the debt of a third person and being without consideration.¹

69. Changes or New Terms in a Contract.—If a contract cannot be created without a valid consideration it would naturally follow that some consideration would be required to modify its terms or add new terms to an existing contract.² Therefore when certain work was being done according to the contract and specifications, and the employer, under threats of stopping the work, and without any further consideration, exacted and secured from the contractor a guaranty concerning the work not embraced in the original contract, it was held that such guaranty was not binding upon the contractor, and that in an action brought by him for the contract price of the work a failure of said guaranty could not be set up as a defense by the owner.³

There is no doubt that at any time after a written contract has been entered into the parties may orally either vary it or abrogate it, if there is a new consideration.⁴

Some tribunals have conceded that an executory parol contract may be varied, or even dissolved, before breach by an agreement to that effect without any new consideration, which involves the idea that if a person who has entered into a contract declare that he will not fulfill it as it stands, nor unless his demands are satisfied, and the other party assents, the new agreement will supersede the old one.⁵ Thus it has been held that if a contractor threatens to abandon his contract on account of pretended mis-

¹ *Dunton v. Chamberlain*, 1 Bradwell 361 [1878].

² *Titus v. Cairo & T. R. Co.*, 37 N. J. Law 98.

³ *McCarty v. The Hampton Bldg. Ass'n*, 61 Ia. 287 [1883].

⁴ *Juilliard v. Chaffee*, 92 N. Y. 529;

Flanders v. Fay, 40 Vt. 316; *Burkham v. Martin*, 54 Ala. 122; *Maxfield v. Terry*, 4 Del. Ch. 618; *Roberts v. Wilkinson*, 34 Mich. 129.

⁵ *Holmes v. Doane*, 9 Cush. 135; *Wilgus v. Whitehead*, 6 W. N. of C. 537.

* *There are numerous decisions to the contrary, which are set forth in Sec. 181.*

representations of the company, or because unexpected difficulties have been encountered, or because the work is too expensive, and the owner agrees to pay an extra price, the promise is binding, though apparently without consideration.¹ So it has been held that no new consideration was necessary to sustain an agreement by the owner to extend the time for completion of a building contract.²

An agreement without a consideration is repugnant to the law of contracts, and it may well be doubted if these cases as stated are good law.³ If these cases were looked into it would be found that there were mutual promises or mutual acts to be performed, or that the question of consideration was not raised until the work was done and the contract executed. There are many cases that decide that a consideration is required to sustain a change in a contract, and to be safe, a consideration should always be insisted upon.

If it is agreed between the owner and the contractor that the work shall be performed in a manner different from that originally agreed upon it has been argued that the undertaking of the contractor to do something different, though only in detail, and the relinquishing by the other party of the right to have it done in a particular manner, furnished consideration enough, and that the court would not go into the question whether it gave an actual advantage.⁴ A contract that has *not* been executed may be rescinded by mutual agreement, the parties exchanging promises not to enforce their rights;⁵ but a contract executed by the contractor, leaving only an obligation to pay on the part of the owner, cannot be rescinded by mutual consent without other consideration.⁶

70. Consideration Good in Part.—When an offer is made for a consideration named no promise arises until the consideration is fully performed. If the consideration consists of several things they must all be performed. If any part of the specified consideration is illegal the illegality will affect the whole, and there will be no binding promise.⁷ If, however, a part only is void or voidable it is otherwise,⁸ for it is impossible to apportion the weight of each part of the consideration in inducing the promise. If, among several things named as consideration, a good and sufficient consideration can be found it is the same as if that alone had been specified as a consideration.⁹ Where independent promises are in part lawful and in part unlaw-

¹ Hart v. Launman, 29 Barb. 410; Osborne v. O'Reilly, 42 N. J. Eq. 467 [1887].

² Izard v. Kimmel (Neb.), 41 N. W. Rep. 1068 [1889]; Hill v. Smith, 34 Vt. 535; Rulge v. Gates (Wis.), 38 N. W. Rep. 181 [1888].

³ Webbe v. Romona O. S. Co., 58 Ill. App. 232.

⁴ Pollock on Contracts 180.

⁵ Foster v. Daber, 6 Exch. 851; Morawetz on Corp'ns, § 371.

⁶ Westmoreland v. Porter, 75 Ala. 452 [1883].

⁷ Langdell's Summary of Contracts 1030; Pollock on Contracts (4th ed.) 321; Edwards Co. v. Jennings (Tex.), 35 S. W. Rep. 1053.

⁸ Clements v. Marston, 52 N. H. 31 [1873].

⁹ Langdell's Summary of Contracts 1030.

* See Sec. 66, *supra*.

ful those which are lawful can be enforced, but if any part of an entire consideration is unlawful all promises founded upon it are void.¹ If the contract is bad in part for being in violation of law, but good in part, and the good part of the contract can be separated from the bad, that which is good can be enforced in law.² The possible invalidity of a provision in the contract for referees in case of differences rising was held not to invalidate the contract as a whole.³ When a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted.⁴ In all contracts in writing and under seal signed by the parties bound thereby, a valid consideration is implied.⁵ Equity will not relieve a surety from liability on an instrument under seal merely for want of consideration when no consideration was contemplated by the parties.⁶

¹ Pollock on Contracts (4th. ed.) 321; *Reed v. Brewer* (Tex.), 37 S. W. Rep. 418. followed in *United States v. Central Pac. R. Co.*, 118 U. S. 235 [1886].

² *Jackson v. Shawl*, 29 Cal. 267 [1865]; *Erie R. Co. v. Union Loc. & Express Co.*, 35 N. J. Law 240 [1871]. ⁵ *Warren v. Johnson* (Kan.), 17 Pac. Rep. 592 [1888]; *Erickson v. Brandt* (Minn.), 55 N. W. Rep. 62; *Fuller v. Artman*, 24 N. Y. Sup. 13.

³ *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 16 Sup. Ct. Rep. 1173.

⁴ *Hobbs v. McLean*, 117 U. S. 567 [1886];

⁶ *Meek v. Frantz* (Pa. Sup.), 33 Atl. Rep. 413.

CHAPTER III.

LAW OF CONTRACTS. ESSENTIAL ELEMENTS OF A CONTRACT.

THE SUBJECT-MATTER. THE ACT TO BE PERFORMED OR THING TO BE ERECTED, FURNISHED, OR SUPPLIED.

71. **Relation of the Subject-matter and the Consideration.**—The act, undertaking, or promise on the part of one party is the consideration for the act, agreement, or obligation of the other party. In fact it cannot be said that the undertaking of the second party is any less the consideration of the contract than is the undertaking of the first party. They are considerations one for the other, and what has been said of the legality or validity of the consideration will be quite as true for the act or promise given in return—*i. e.*, the act or subject-matter must be a lawful undertaking and one not contrary to the policy of the law. Whatever may be said of the acts or undertakings of one party will hold equally true for the acts or undertakings of the other party. The consideration on both sides in construction contracts is usually an act or a promise to perform certain acts. The consideration on one side may be a material object, as a sum of money or a cargo of lumber, or it may be a circumstance or a condition of detriment. It may be an act or the refraining from doing some act. Whether a material object or a condition, the contract obligation existing between two parties is usually, if indeed not always, the result of an act on the part of one or both parties. It is not the mere existence of the money or the lumber that is the consideration of the contract, but the act of paying the money or the delivery of the materials is the real consideration of the contract. The loss of the ship, the burning of the house, or the death of the person may mark the hour from which the company is liable for the insurance, but the right to demand the insurance dates from the proof of certain conditions which requires an act on the part of one of the parties. The consideration may be either the doing of an act or the giving of a promise.¹

AS REGARDS THE ACT TO BE DONE OR UNDERTAKEN OR THE CONSIDERA- TION FOR WHICH IT IS UNDERTAKEN.

72. **There Must be a Lawful Subject-matter—The Promise Must be to Perform a Lawful Act.**—A legal contract requires that the obligations as-

¹ 3 Amer. & Eng. Ency. Law 831.

assumed shall be lawful acts or undertakings not only within the written law of the land, but that they shall be in harmony with the law and in keeping with the policy of the government and good society, and that their execution shall be possible. The consideration on both sides can be neither wicked nor prohibited by law.¹ It therefore follows that the consideration, the act or undertaking, of either party must not be opposed to the constitution of the United States or of the State; it must not be contrary to law, and the effect of the contract must not be to defraud or injure the government.

Among the latter agreements are those that promote smuggling, evade the internal-revenue laws, assist in rebellion or riot, aid enemies of our country, effect fraud in elections, or interfere with legislation or the administration of justice by our courts. Contracts to build ships of war or to manufacture arms or to furnish supplies in violation of the laws and treaties of our country will not be recognized by our courts.

73. Contracts the Effect of Which is to Influence Public Officers.—A contract must not tend to influence legislative bodies or public officers in the discharge of their duties. A contract to pay a certain sum of money annually for ten years in consideration of the owners offering their building to the government for a post-office at a nominal rent and using their personal influence and proper persuasion to have the post-office located in that building was held illegal and against public policy, and, the consideration being indivisible and partly illegal, the whole contract was declared void.² If the owners were not to have used their influence and persuasion with the public officers it seems the contract would have been legal.³

If there be no evidence that a politician had influenced any legislators or public officers in his behalf, then the contract might be held valid and not necessarily against public policy.⁴ The government may enter into a lease of a building for a nominal sum, the rent being made small to induce it to locate the office in such building. Such a lease is not contrary to public policy in the absence of anything to show that the building is not a convenient and desirable one for the purpose.⁵

An agreement by a public officer to accept a greater or less fee than is prescribed by statute, or not to avail himself of a statutory mode of enforcing the collection of his fees, is against public policy, as is also a contract to delegate his official duty, or to pay a rival candidate half of the profits of an office, or for a deputy to divide all his fees with his principal, such fees being payable directly to such deputy,⁶ or for the principal to appoint a certain person as deputy in case he is elected.⁷

¹ Pollock on Contracts 322.

² 9 Amer. & Eng. Ency. Law 916; Elk-art Co. Lodge v. Crary, 98 Ind. 238 [1884]

³ Fearnley v. De Manville (Colo. App.), 39 Pac. Rep. 73.

⁴ Beal v. Polhemus, 34 N. W. Rep. 532,

many cases cited.

⁵ Deyoe v. Woodworth (N. Y. App.), 39 N. E. Rep. 375; 24 N. Y. S. 373 affirmed; 9 Amer. & Eng. Ency. Law 915.

⁶ Conner v. Canter (Ind. App.), 44 N. E. Rep. 656.

Contracts for public favor or personal influence with the government or with public officials are against public policy. Such are contracts to pay officers for their influence in procuring contracts for work, as to have a certain person's bid accepted;¹ or to procure sales, or to induce any one to do acts inconsistent with his duty.

Any agreement which contemplates the use of private influence to secure legislation is void,² but a contract to draft bills, explain them to members of the legislature, and request their introduction is not.³ An agreement to procure the passage of a bill declaring certain railroad lands forfeited to the government, so that one party to the contract might be benefited as a *bona fide* settler under the homestead laws, is void as against public policy.⁴ Contracts with legislators to secure franchises, enactments, and licenses for public works, by would-be contractors or companies that want charters for special works, are within the same class.

A mortgage given to secure the payment of compensation for procuring the appointment or resignation of a public officer is void as against public policy.⁵ Money paid under a contract for the sale of property which is contrary to public policy, because of a promise by one of the parties to resign a public office and use his influence to secure the other's appointment, cannot be recovered on refusal of the seller to perform.⁶ An assignment of, or a lien on, the unearned salary or fees of a public officer, given by him, is void as against public policy.⁷

74. Contracts for the Perversion of the Courts.—A legal contract cannot have for its object the perversion of our courts or the obstruction of justice.⁸ An agreement to procure evidence in consideration of a part of the sum recovered is against public policy;⁹ and one to stifle a prosecution or to withhold testimony therein is absolutely void, and no recovery can be had on a promissory note given in consideration of such an agreement.¹⁰

Agreements to pay money to a witness to keep out of court,¹¹ or to induce a public officer to violate his trust or neglect his duty, or to do things inconsistent with his official duties,¹² to gain particular official

¹ Davidson v. Seymour, 1 Bosw. (N. Y.) 88; Halcomb v. Weaver, 136 Mass. 265; and see Bermudez Asph. Pav. Co. v. Critchfield, 62 Ill. App. 221.

² Burney's Heirs v. Ludeling (La.), 16 So. Rep. 507.

³ Chesebrough v. Conover (N. Y. App.), 35 N. E. Rep. 633; 21 N. Y. S. 566 affirmed.

⁴ Houlton v. Dunn (Minn.), 61 N. W. Rep. 898; but see contra Houlton v. Nichol (Wis.), 67 N. W. Rep. 715.

⁵ Basket v. Moss (N. C.), 20 S. E. Rep. 733.

⁶ Edwards v. Randle (Ark.), 38 S. W.

Rep. 343.

⁷ State Nat. Bank v. Fink (Tex. Sup.), 24 S. W. Rep. 256; Williams v. Ford (Tex. Civ. App.), 27 S. W. Rep. 723.

⁸ Bierbauer v. Wirth, 5 Fed. Rep. 336 [1880].

⁹ Lyon v. Hussey (Sup.), 31 N. Y. Supp. 281; Kennedy v. Hodges (Ga.), 25 S. E. Rep. 493.

¹⁰ Friend v. Miller (Kan.), 34 Pac. Rep. 397.

¹¹ In re Brule (D. C.), 71 Fed. Rep. 943.

¹² Robinson v. Patterson (Sup. Ct. Mich.), July, 1888; Schlass v. Hewlett (Ala.), 1 So. Rep. 263.

favor,¹ or to influence legislators,² and similar undertakings, are illegal contracts, and will not be enforced by our courts.³

75. The Undertaking Must Not be Contrary to Federal or State Laws, or in Disregard of Police Regulations or City Ordinances.—It is not necessary that the parties should actually contract to do the acts specially prohibited, but it is sufficient if the tendency is to subvert the laws, or overthrow, defraud, or injure the government or its institutions. If the contract is made for the purpose of using the subject-matter in a manner prohibited by law there can be no recovery on the contract.⁴ Mere knowledge of the use to which the things are to be put will prevent recovery for them if the act prohibited amounts to a felony.⁵ Knowledge alone, even if the act does not amount to a felony, will preclude recovery in England.⁶ In short if the agreement is to do anything to facilitate the doing of an unlawful act it is invalid, and there can be no recovery. A case in trade is reported where a quantity of candy and silverware was sold, to be put up in "prize candy packages"; it was held that the transaction, having been for the purpose of aiding in a lottery, which was prohibited by the New York statutes, it was void and that no recovery could be had upon the contract.⁷

76. The Contract Must Not be to Invade Property Rights, to Commit or to Maintain a Nuisance, to Obstruct a Public Way or Stream, or to Commit a Trespass.—Some cases of interest to engineers and contractors will best demonstrate these points of contract law. Thus it is submitted that a contract to erect a bridge over, or a tunnel under, the Hudson River at New York, entered into before the necessary franchise had been obtained from the state and Federal governments would not be a binding obligation; or a contract to drive piles or build a pier out into the bay beyond the harbor-line; or to do work that would necessarily obstruct a public street or waterway.⁸ A contract to build a railroad or canal through a state, territory, or reservation, entered into before the corporation had obtained its franchise or authority from the state to build, would not be a valid contract; certainly the contractor could not be required to fulfill his contract until the necessary license and permission had been obtained. Such cases come up not infrequently; such are contracts to construct waterworks or irrigation ditches, canals or sewers when the appropriation or pollution of the water would be an unlawful act, or to drive a tunnel under a government fortress, as occurred on the West Shore Railroad at West Point. The question has been asked

¹ 3 Fed. Rep. 1; *Hager v. Callin*, 18 Hun 448 [1879]; *Staunton v. Parker*, 19 Hun 55 [1879].

² 2 Amer. & Eng. Ency. Law 366.

³ See a good collection of cases in 9 Amer. & Eng. Ency. Law 879-930.

⁴ *Caanan v. Bryce*, 3 B. & Ald. 179; *McKimmel v. Robinson*, 3 M. & W. 434.

⁵ *Hanauer v. Doane*, 12 Wall. 342; but see *Fedder v. Odorn*, 2 Heisk. 68.

⁶ 2 Keener's Cases on Quasi-Contracts 35, note.

⁷ *Hull v. Ruggles*, 56 N. Y. 424; see also *Arnot v. Coal Co.*, 68 N. Y. 558; and *Lynch v. Resenthal (Ind.)*, 42 N. E. Rep. 1103, a contract for sale of lots to subscribers to be determined by lot, held void.

⁸ *Whitfield v. Zellnor*, 2 Cushman (Miss.) 663, work enjoined as a nuisance.

as to whether a contractor after having built a structure upon, or driven a canal through, Federal property, or diverted a stream, or appropriated the waters of a pond, or constructed an outlet for a sewer, or directed a sewer into an unpolluted stream, any of which acts is an unlawful act, and which has been the consideration for his contract, could recover on such a contract for what he has done. It has been held that a party could not avoid a contract on the theory that the doing of extra work was malicious mischief, because the extra work required the contractor to dig or excavate in a street without proper license, which was an unlawful act.¹

A contract to build houses on a disused unconsecrated burial-ground, necessitating the removal of many corpses, has been held illegal;² and it has been held that no recovery could be had under a contract to grade a street for earth filled outside the street-line and included in the slopes, and which had been deposited on private property, as it was an unlawful act without the consent of the owner,³ but the fact that a part of the improvement was on private property did not prevent the contractor from recovering for work done on the street.⁴ Recovery has been allowed a contractor who built a bridge and some track without the railroad company's territory, the contract for which was void, where it appeared that the company had possession and enjoyed the benefit of the structures.⁵ The act of the city in preventing the contractor from improving a street in which the city had no right of way does not give the contractor a right to recover as for breach of contract, as the contract was void.⁶

Instances are numerous in the engineering profession where contracts have been taken to build structures or do work by processes that are patented, the execution of which could be stopped by an injunction and the performance of which would be unlawful, but whether the contractor would be excused and the contract declared illegal may well be doubted.⁷ Such might be cases of patent processes or patent apparatus required, such as patent heating apparatus, patent pavements, etc. A contract to publish a copyrighted book without permission of the author, or to act a play, or to copy a picture without permission of the artist would be of the same character.*

Contracts to erect structures the maintenance, ownership, and use of which are contrary to law are not binding. Such are contracts in violation of local ordinances and building regulations, as those fixing the thickness of

¹ *Bernstein v. Downs* (Cal.), 44 Pac. Rep. 557.

² *Gibbons v. Chalmers*, 1 C. & E. 577 [1885].

³ *Davies v. E. Saginaw* (Mich.), 32 N. W. Rep. 919 [1887].

⁴ *Johnson v. Duer* (Mo.), 21 S. W. Rep. 800.

⁵ *Cunningham v. Massena Springs R. Co.* (Sup.), 18 N. Y. Supp. 600.

⁶ *Sang v. Duluth* (Minn.), 59 N. W. Rep. 878; *Becker v. Phila.* (Pa.), 16 Atl. Rep. 625 [1889].

⁷ See cases in *Dillon's Munic. Corp'ns*, (4th ed., 1890), § 468, § 467 note.

* See Secs. 216-225, *infra*.

walls.¹ It has been held that a carpenter and builder could not recover for work he had performed upon a bowling-alley in the state of Ohio, the building being unlawful property.² For labor and materials furnished for the erection of an awning which is forbidden by a city ordinance no recovery was allowed, neither upon the express contract with the owner nor upon an implied contract, as on a *quantum meruit*. The law will not assist those who have transgressed its commands, but leaves the parties where they have placed themselves.* *

When a statute prohibits every contribution of money to promote the election of any person or ticket, except for expenses of printing and the circulation of handbills and other papers previous to such election, an agreement to pay \$1000 to one who had built a log cabin for campaign meetings in consideration that he would keep it open for the accommodation of political meetings to further the success of certain candidates nominated for congress was held illegal and not enforceable.⁴

Contracts for the erection of a building in violation of a city's building regulations, such as pertain to safety of the structure and infringement of others' rights and the protection of citizens, may be declared invalid.* It has been held that a contract to erect a proper and legal building is avoided by an ordinance passed two days after the contract was made prohibiting the erection of such a building.* A contract to erect a building prohibited by the statute will not become valid by reason of the subsequent repeal of the statute.⁷ A contract executed in consideration of a previous illegal contract is also void.⁸

77. The act must not be to commit a crime or a misdemeanor, or to injure others in the enjoyment of their rights.

78. The agreement must not be for the sale or supply of adulterated goods, or of intoxicating liquors in violation of excise laws prohibiting traffic in them.

79. The act must not require either party to violate the Sabbath laws or to ignore the laws and regulations of society.†

80. The act must not be to effect something in contravention of the law or public policy or in violation of judicial morals; to do what the law forbids or to neglect what the law requires.⁹

¹ *Stevens v. Gourley*, 7 C. B. N. S. 99.

² *Spurgeon v. McElwain*, 6 Ohio 442; see also 14 Amer. & Eng. Ency. Law 786.

³ *Brinkman v. Eisler*, 16 N. Y. Supp. 154, and many cases cited; and see another awning case, *Simis v. Brookfield*, 34 N. Y. Supp. 695; and see *Ellwood v. Mani* (Com. Pl.), 16 Pa. Co. Ct. Rep. 474; and *Harper v. Jonesboro* (Ga.), 22 S. E. Rep. 139.

⁴ *Jackson v. Walker*, 5 Hill (N. Y.) 127 [1843].

⁵ *Stevens v. Gourley*, 7 C. B. N. S. 99; *Burger v. Roelsch* (Sup.), 28 N. Y. Supp. 460.

⁶ *McMillin v. Walker*, 21 N. B. R. 31.

⁷ *Bancher v. Mansel*, 9 Amer. & Eng. Ency. Law 881, and cases cited.

⁸ *Cate v. Blair*, 6 Coldw. 639; *Pierce v. Kibbee*, 51 Vt. 559; *King v. Winanto*, 71 N. C. 469, also 73 N. C. 563.

⁹ 9 Amer. & Eng. Ency. Law 880.

* See Sec. 87, *infra*.

† See Sec. 59, *supra*.

81. The Undertaking must Not Have for Its Object the Creation of a Monopoly.—Such acts are attempts by the officers of cities, railroads, and other corporations to grant exclusive rights or franchises to individuals and other companies, as “the exclusive right to sell water to a city,”¹ “the exclusive right to maintain and construct a telegraph-line along a railroad.”² A contract by a railroad company granting to a hackman the exclusive right to bring his hacks into its depot grounds has been held not against public policy.³ But a contract by a town to give to one party an exclusive right or franchise for many years to light its streets and its residences is a monopoly, and cannot be enforced.⁴ The granting of exclusive privileges to telegraph companies to run wires along the line of a railroad or to lay an oil-line across a large tract of land is void as tending to create monopolies.⁵

A railroad company may not agree to refrain from applying to the legislature for a land grant and to assist another railroad company in getting it. Such a contract is void, even though it stipulates that the means employed in securing the grant shall be reasonable and proper.⁶ A contract not to sell water rights to any other person or persons under a penalty called liquidated damages, and not to make any settlement or compromise with other parties, is void as imposing a restraint upon compromises of litigation and disputes.⁷

Certain cases may be recited to show how near the line one can walk and yet keep within public policy. Thus it has been held that two railroad companies whose lines are parallel may agree to extend their lines so as not to interfere with one another, the agreement being made to prevent an unprofitable war of construction.⁸ A contract by a railroad company by which it agrees to give all its ferry business at a certain point to one company and to employ none other has been held a good and valid contract.⁹ An agreement to refrain from forming a corporation for the construction of waterworks and from carrying on or prosecuting such work so that another may incorporate for that purpose and conduct the business without competition is not void as against public policy.¹⁰ An agreement by a vendor in consideration of the sale of a lot not to build a flat in the immediate neighborhood is not against public policy as being in restraint of trade.¹¹

¹ *Davenport v. Kleinschmidt* (Mont.), 13 Pac. Rep. 249 [1887].

² *Pac. Tele. Cable Co. v. W. Union Telegraph Co.*, 50 Fed. Rep. 493.

³ *Brown v. N. Y. Cent., etc., R. Co.*, 27 N. Y. Supp. 69.

⁴ *Saginaw Gas & Light Co. v. Saginaw* (U. S. Cir. Ct.) (Mich.), 22 The Repr. 579 [1886]; *Gale v. Kalamazoo*, 23 Mich. 344.

⁵ 9 Amer. & Eng. Ency. Law 892; *Union Trust Co. v. Atchison, etc., R. Co.* (N. M.), 43 Pac. Rep. 701.

⁶ *Chippewa, etc., Ry. v. Chicago, etc., Ry.*, 44 N. W. Rep. 17.

⁷ *Ford v. Gregson* (Mont.), 14 Pac. Rep. 659 [1887].

⁸ *Ives v. Smith*, 8 N. Y. Supp. 46.

⁹ *Wiggins Ferry Co. v. C. & A. R. Co.*, 73 Mo. 389 [1881].

¹⁰ *Oakes v. Cattaraugus Water Co.* (N. Y.), 38 N. E. Rep. 461.

¹¹ *Lewis v. Gallner* (N. Y.), 29 N. E. Rep. 81, reversing 14 N. Y. Supp. 362.

Contracts in general for total restraint of trade, or contracts for the purpose of creating a monopoly, or compacts having for their object the elevation or depression of the market prices, or to raise or lower the prices of goods and produce, or sales of stocks, grain, and produce on margins, or option contracts whose effect is to corner the markets, are held to be against public policy and void.¹

82. Contracts Not to Bid or Compete.—If the undertaking is to prevent competition in trade at public sales or in bidding for public work it is against public policy. A compact entered into by members of a trade-union to establish and maintain uniform rates of charges and to prevent competition among its members is illegal, and one party cannot maintain an action against another who has underbid him.² A contract, or a note given by reason of an agreement, between contractors who belong to an association of masons and builders, the by-laws of which require the members to pay to the association 6 per cent. on all contracts taken by them, and to submit all bids for work first to the association, and which provide that the lowest bidder shall add 6 per cent. to his bid before it is submitted to the owner or his architect, is contrary to public policy and void.³

Contracts by builders or bidders to refrain from bidding against each other for public works or to share the profits with others not bidding at a public sale, or any agreements which tend to destroy competition, which the law requires before the contract is awarded, or to induce a sacrifice of the property sold, are illegal and void.⁴ However, an agreement to bid, the object of it being fair, is not void.⁵ It is a fraud upon the public for persons to obligate themselves not to bid, or not to bid beyond a certain sum.⁶ An agreement to pay certain commissions to a person who shall become a mock subscriber and purchaser of house-lots, which the owner is to take back off his hands if he does not wish to keep them, the object being to induce others to purchase, is against public policy.⁷ * Contracts by companies who have been competitors who agree not to compete with each other either as railroads for traffic, but to divide their earnings;⁸ or as gas companies, not to compete in certain districts of a city, will not be enforced.⁹ A railroad pooling contract, the evident object of which is to stifle competition for the purpose of raising rates, is void as contrary to public policy.¹⁰

¹ *Illegal Contracts*, 9 Amer. & Eng. Ency. Law 879.

² *Moore v. Bennett* (Ill.), 29 N. E. Rep. 888.

³ *Milwaukee Masons' & Builders' Ass'n v. Niezerowski* (Wis.), 70 N. W. Rep. 166.

⁴ 9 Amer. & Eng. Ency. Law 898; *People v. Stevens*, 71 N. Y. 527; *Durfee v. Moran*, 57 Mo. 374 [1874].

⁵ *Wicker v. Hoppock*, 6 Wall. 94 [1867]; *Flanders v. Wood* (Tex.), 18 S.W. Rep. 572, *between competing architects*.

⁶ *Hunter v. Pfeifer*, 108 Ind. 197; *see*

also McMullen v. Hoffman (C. C.), 75 Fed. Rep. 547.

⁷ *McDonnell v. Rigney* (Mich.), 66 N. W. Rep. 52; *Atlas Nat. Bank v. Holm* (C. C. A.), 71 Fed. Rep. 489.

⁸ *Texas & R. Ry. Co. v. So. Pac. R. Co.* (La.), 6 So. Rep. 888.

⁹ *Chicago G. L. Co. v. People's G. L. Co.* (Ill.), 13 N. E. Rep. 169 [1887].

¹⁰ *Chicago, M. & St. P. Ry. Co. v. Wash. St. L. & P. Ry. Co.* (C. C. A.), 61 Fed. Rep. 993.

* *See* *Lowest Bidder*, Chap. VI., Sec. 148, *infra*.

83. Contracts that Promote Gambling.—It is against the policy of the law to sustain gaming or gambling contracts, whether at games of chance or on the stock-market; or even to enforce agreements to repay money borrowed for the purpose of gambling.¹ Anything which induces a man to risk his money or property without any other hope of return than to get for nothing any given amount from another is gambling and demoralizing to the community. All gambling is immoral, and, wagering or gambling agreements being in violation of the law and in the nature of a public wrong, have no legal effect. Money lent for the express purpose of settling losses on illegal stock-jobbing transactions to which the lender was no party, cannot be recovered back. It being unlawful for one man to pay, it cannot be lawful for another to furnish him with the means of paying. The mere fact that a lender of money knew that it was to be used for gambling in oil is not sufficient to defeat a recovery unless he confederated with the borrower for its unlawful use.²*

84. The Act Must Not be Inconsistent with the Duties and Obligations of a Party Who has Undertaken It.—Such duties and obligations may be due to the public, or they may be such as arise from fiduciary relations, as those of an agent to his employer, or of an officer to his company, or of a trustee to his beneficiary. Thus it has been repeatedly held that the officers of a railroad company cannot agree to locate its depot at a particular point,³ or the route of its road through a certain place.⁴ If the contract tends to sacrifice the interests of stockholders or of the public it is against public policy and therefore not valid.⁵ The agreement is not of itself void,⁶ and will hold if the company's and public interests have not suffered.⁷

An interesting case came before the courts in Oregon, where one H. being director and president of a railroad company and owner of a controlling interest in the stock, agreed for a money consideration to cause the line of railroad to be relocated over a longer and more expensive route; the contract was held to be contrary to public policy. It was held that a railroad company was a sort of public corporation, and that its officers were bound to be disinterested in the consideration of public questions.⁸

85. A Fiduciary Can have No Personal Interest in His Principal's Contract.—Independent of the fact that a railroad company is a *quasi*-public cor-

¹ Stebbins v. Leowolf, 3 Cush. 137 [1849].

² Waugh v. Beck (Pa.), 6 Atl. Rep. 923 [1886].

³ Florida Cent. & P. R. Co. v. State (Fla.), 13 So. Rep. 103; Northern Pac. R. Co. v. Territory (Wash.), 13 Pac. Rep. 604 [1887].

⁴ Linder v. Carpenter, 62 Ill. 309 [1872]; also 13 Ill. App. 568.

⁵ Bestor v. Wathen, 60 Ill. 138 [1871].

⁶ Railroad Co. v. Ralston, 41 Ohio St. 573.

⁷ Frev v. Ft. Worth & R. G. Ry. (Tex.), 24 S. W. Rep. 950; Bank v. Hendrie, 49 Iowa 402 [1878]; Mills County v. B. & M. R. Co., 47 Iowa 66 [1877].

⁸ Holiday v. Petterson, 5 Oregon 177 [1874]; 1 Redfield on Rys. 577, § 140; Fuller v. Dame, 18 Pick. 472; Pacific R. Co. v. Seeley, 25 Mo. 212; Bestor v. Wathen, 60 Ill. 138 [1871].

* See Sec. 75, *supra*.

poration, the fiduciary relation of an agent, engineer, officer, or director of a corporation to his company and its stockholders would prevent him from having any personal interest in a contract.¹ A contract by a freight-agent to share with a contractor in the profits of a contract, the only service of the freight-agent being to allow the contractor a low freight rate on materials of construction, is void as against public policy.² An agreement by the bookkeeper of a corporation to disclose its financial condition to another is void, and it is immaterial that such other is a stockholder of the corporation.³ An agreement between two real-estate agents representing different principals to divide commissions in case they effect a sale between their respective principals is void as against public policy, and the fact that the sale was effected at the valuation that each principal had set on his property with his agent will not give validity to the agreement.⁴ A contract made by a person on behalf of two parties and acting in the capacity of agent for both is voidable. It must be ratified or adopted to become binding. Such a contract may be ratified by a municipal corporation.⁵ An agreement by the superintendent and general manager of a mill company in consideration of five thousand dollars to use his influence and authority to secure the removal of the mill to another place and the extension of its logging-roads to that place is void as against public policy.⁶ So where an architect and defendant agreed to build houses for sale, the latter to advance the money and the former to contribute his skill and time as superintendent, each to have half of the profits after sale, it was held that the defendant could not charge plaintiff with the land used for building purposes at a greater price than its original cost, though it was bought with money furnished by him and the title was taken in his name.⁷

However, a contract founded on a promise to disclose information as to a place where a railroad company intended to locate its depot is not void as against public policy where there is nothing to show that the plaintiff obtained his information by reason of any relation of trust or confidence that he bore to the railroad company, or that it had any interest in the subject-matter of the contract, or that it attempted to keep the location of the depot a secret.*

86. A Man Cannot by Contract Forfeit Certain Rights and Privileges the Protection of Which the Law Guarantees.—"The Declaration of Independence holds the truth self-evident that all men were endowed by their Creator with certain inalienable rights ; that among these are life, liberty, and

¹ *Bestor v. Wathen*, 60 Ill. 138.

² *Barclay v. Williams*, 26 Ill. App. 213 [1887].

³ *Davenport v. Hulme* (Super.), 32 N. Y. Supp. 803.

⁴ *Levy v. Spencer* (Colo. Sup.), 33 Pac. Rep. 415.

⁵ *City of Findlay v. Pertz* (C. C. A.), 66 Fed. Rep. 427.

⁶ *Lum v. Clark* (Minn.), 57 N. W. Rep. 662.

⁷ *Budd v. Scudder* (N. J. Ch.), 26 Atl. Rep. 904.

^{*} *Green v. Brooks* (Cal.), 22 Pac. Rep. 849 ; but see *Wills v. Abbey*, 27 Tex. 203.

* And see Sec. 42, *supra*.

the pursuit of happiness"; and, being inalienable, no one can give them away for or as a consideration; and to these might have been added one's character, religion, citizenship, and many other things which cannot be for sale or subjects of exchange.¹

Such an agreement would be against the policy of the law, and against public policy. If the undertaking tends to injustice or oppression, restraint of liberty, commerce, or natural or legal right; if it tends to obstruct justice, or to violate the law, or is against good morals—it is against public policy and cannot support a contract.² It does not matter that the parties are innocent of any design to violate the law; if the effect of their agreements or acts is against the laws or public policy, then the contract must fail.

It is contrary to public policy for a person to make agreements to forego his inalienable natural rights. A contract by which a person agrees not to demand damages or compensation for injuries that may arise from another's acts or negligence is within this class. Such contracts are those of carriers of freight and passengers, as railroad, express, and telegraph companies, that seek to avoid or limit their responsibility for negligence or delay in transporting or delivering goods or messages by notices, clauses, conditions, or even by deeds. Such agreements and contracts have frequently been declared inoperative and void.³ It may be doubted even if they may so contract with persons carried gratuitously, *i. e.*, with persons traveling on free passes. It has frequently been held that they could not, though there are cases to the effect that they can.⁴ A railroad company was held liable for causing the death of a passenger by the negligence of its employees notwithstanding he was at the time riding upon a free pass upon which was a stipulation signed by him releasing the company from all liability for injury to his person or property while using the pass.⁵ A contract on a telegraph-message blank that the company will not be liable for but ten times the cost of sending the message has been held invalid so far as the damage is the result of negligence on the part of the company or its servants.⁶

Parties cannot by private agreement in advance of a controversy oust the courts of their proper jurisdiction. It is true that a matter in controversy or a pending civil suit may be finally submitted to arbitration or to the

¹ 9 Amer. & Eng. Ency. Law 883.

² 9 Amer. & Eng. Ency. Law 880.

³ 9 Amer. & Eng. Ency. Law 913; 26 Amer. Law Rev'w 213 [1892]; 21 Amer. Law Rev'w 506; L. S. & M. S. Ry. Co. v. Spangler (Ohio), 23 The Repr. 734 [1886], 44 Ohio St. 471; Porter v. N. Y. L. E. & W. R. Co., 129 N. Y. 624 [1891].

⁴ See cases just cited, and see 36 Alb. Law

Jour. 404. A recent case carried to the court of appeals in New York held not. Porter v. N. Y. L. E. & W. R. Co., 129 N. Y. 624, [Dec. 1891]; see also Rose v. Des Moines R., 39 Iowa 246, 20 Amer. Ry. Rep. 326; and many cases cited in note p. 338.

⁵ Marr v. Telegraph Co. (Tenn.), 3 S. W. Rep. 496 [1887], 85 Tenn. 529.

* See Engineers' and Architects' Employment, Sec. 264, *infra*.

decision of a single judge, or by omitting to exercise their rights the parties may waive them as they choose, but they cannot by an agreement in advance, when no matter of dispute or controversy has yet arisen, forfeit their rights to a proper adjudication in the appropriate tribunal established by law when a proper case may be presented.¹ It is a constitutional right, and neither a statute by the state nor an agreement of the parties made in advance under it can justify a denial of the right.²

It is true that parties may impose as a condition precedent to an application to the courts that they shall first have settled the amount to be received by an agreed mode of liquidation or adjustment, and this in many cases provides a much more appropriate tribunal for the purpose than a jury.³ The principle involved in these cases does not close the access of the parties to the courts of law, as the award of the arbiter is only enforceable there. On the same ground it is against public policy to sustain an agreement by an employee that an officer of the company employing him shall be the sole judge of the damages to be assessed for breach of the company's rules, and that the officer's decision shall be final and conclusive of the rights of the employee;⁴ but it has been held that a contract by which a railroad employee agreed, on becoming a member of the relief department of the company, that the acceptance of relief from such department on being injured should bar his right to sue the railroad company for the injury is not one against public policy.⁵ It is not invalid in that it restricts the liabilities of railroads for the negligence of their employees.⁶ Nor is it void for want of mutuality nor for lack of consideration.⁷ It is on this same ground of public policy that agreements by contractors to abide the decisions of civil engineers and architects as final and conclusive, without recourse to courts of law or equity, have been declared not binding, illegal, and void. The courts have held that the government guarantees every man the protection of the courts and their assistance, and that no man can enter into a contract that shall deny him this privilege and right.

A contract of employment between a company using patented machines and a mechanical engineer which requires that any improvements in the machines made by such engineer shall belong to the company is not unreasonable nor contrary to public policy.⁸

¹ See *Ins. Co. v. Marse*, 20 Wall. 445.

² See *Atlanta & R. Co. v. Monghan*, 49 Ga. 266; *Nate v. Hamilton Ins. Co.*, 6 Gray 174; *Hobbs v. Manhattan Ins. Co.*, 55 Me. 421; *Scott v. Avery*, 5 H. of L. Cas. 811; *Story Eq. Jur.*, § 670.

³ *Mouon Nav. Co. v. Fenlon*, 4 W. & S. 205; 7 Casey 306; 79 Pa. St. 480, *citing engineering cases to support them*.

⁴ *White v. Middlesex R. Co.*, 135 Mass. 216 [1883].

⁵ *Chicago, B. & Q. R. Co. v. Bell* (Neb.), 63 N. W. Rep. 314; *Pittsburgh, etc., R. Co. v. Cox* (Ohio Sup.), 45 N. E. Rep. 641; *Shaver v. Penna. Co. (C. C.)*, 71 Fed. Rep. 931.

⁶ *Donald v. Chicago, B. & Q. Ry. Co.* (Iowa), 61 N. W. Rep. 971.

⁷ *Pittsburgh, etc., R. Co. v. Cox*, *supra*.

⁸ *Hulse v. Bonsack Mach. Co. (C. C. A.)*, 65 Fed. Rep. 864.

* See Secs. 216-225, *infra*.

87. Immoral Contracts.—A contract for immoral or indecent purposes will not be sustained; if it is to effect an immoral object it will not be enforced. An agreement to pay money for the use of a carriage or of a house or of furniture which is to be used for immoral purposes will not be enforced; and the same, it is submitted, might hold true if a contractor had built a house or fitted up quarters knowing they were to be employed for indecent or unlawful purposes, or for any purpose that tends to induce immorality.¹ Such might be the erection of a still for illicit distillation, or the fitting and furnishing of a barroom in a no-license state, or the erection or furnishing of a house of prostitution or for gambling,² or possibly of a bucket-shop or even a stock exchange.³ * An owner who has parted with the possession of his personal property under a contract which is against good morals and void as against public policy, the law will not aid him to recover the possession of such property, but will leave the parties in the situation in which they have placed themselves.⁴

All contracts having for their object the "making of matches" for marriages, or the separation of man and wife, or to restrain the freedom of marriage or the right of selection of a companion, or to prohibit marriage, are against public policy, illegal, and void.⁵ Therefore a contract intended to facilitate the procuring of a divorce at the suit of either of the parties thereto is void.⁶ A contract to sell letters from persons who are diseased to a person who advertises articles and instruments to cure them is contrary to good morals and void.⁷ No recovery can be had for the expense of printing an immoral publication.⁸

Illicit intercourse is not a consideration for a promise to marry, and a promise to marry a woman if she will give herself up to the promisor is tainted with immorality and is not a legal contract. Such a contract must be distinguished from a promise to marry and the promisor afterward taking advantage of the trust and confidence imposed in him.⁹

The defense of public policy proceeds not upon the idea of relief to the defendant, but protection to the public, and it is immaterial that a defendant was ignorant of the illegality.¹⁰ It is not therefore necessary to plead public policy to prevent a recovery on a contract invalid as against public policy.¹¹

¹ 9 Amer. & Eng. Ency. Law 921; *Pearce v. Brooks*, L. R. 1 Exch. 213; *Reed v. Brewer* (Tex.), 36 S. W. Rep. 99.

² *Contra* *Michael v. Bacon*, 49 Mo. 476, and cases cited.

³ See cases collected in 9 Amer. & Eng. Ency. Law 922. *Reed v. Brewer*, *supra*, held that notes given for furniture for a house of prostitution were void.

⁴ *Hutchins v. Woldin*, 114 Ind. 80 [1887].

⁵ 9 Amer. & Eng. Ency. Law 918-921.

⁶ *Wilde v. Wilde* (Neb.), 56 N. W. Rep. 724.

⁷ *Rice v. Williams*, 32 Fed. Rep. 437 [1887].

⁸ *Poplett v. Stockdale*, 2 C. & P. 198.

⁹ *Hanks v. Waglee*, 54 Cal. 51 [1879]; *Bourngueres v. Boulon*, 54 Cal. 146 [1880]; *Saxon v. Wood* (Ind.), 30 N. E. R. p. 797.

¹⁰ *Church v. Proctor* (C. C. A.), 66 Fed. Rep. 240.

¹¹ *Sheldon v. Pruessner* (Kan.), 35 Pac. Rep. 201.

* See Sec. 76, *supra*.

When the immediate object of an agreement is unlawful the agreement is void,¹ and a contract executed in consideration of a previous illegal one is void.²

A contract otherwise valid is not void *in toto* merely because in certain independent particulars it is broader than, or goes beyond the scope of, the law.³

¹ Pollock on Contracts (4th ed.) 321.

² *Cate v. Blair*, 6 Coldw. 639; *Pierce v. Kibbee*, 51 Vt. 559; *King v. Winanto*, 71 N. C. 469, *also* 73 N. C. 563.

³ *Ragsdale v. Nagle* (Cal.), 39 Pac. Rep.

638; *Arnot v. Coal Co.*, 68 N. Y. 558. A case of making the price of coal, the plaintiff had assisted in facilitating the illegal act. *And see* 2 Keener's Cases on Quasi-Contracts 35.

CHAPTER IV.

LAW OF CONTRACTS. ESSENTIAL ELEMENTS OF A CONTRACT. MUTUAL CONSENT OR MUTUAL ASSENT.

88. There Must be Mutual Understanding.—The fourth essential element of a valid and binding contract is a mutual understanding between the parties as to the essential terms of the agreement between the parties; there must be privity, mutual understanding, and no mistake.¹ Mutual consent must always exist at the moment when the contract is made. An express refusal to abide by an award, made at different times by the parties thereto and without any meeting of their minds, is not a contract that will operate as a discharge of the award.²

89. Mutual Consent Must be Shown by Some Overt Act.*—It is impossible to enter into a person's thoughts or ascertain how fully he comprehends what he is doing or what he intends to do, and mutual assent is not therefore in general capable of direct proof; but proof of acts performed that indicate a purpose or intention on the part of the contractor is sufficient proof of consent on his part to the terms of his agreement. As Professor Langdell has said in his Summary:³ "Mental acts are not the materials out of which promises are made; a physical act on the part of the promisor is indispensable, and when the physical act has been done only a physical act can undo it." If one party has made an offer which has been duly accepted by the other, or if one has made a delivery and the other appropriated the thing delivered, proof of these facts is sufficient proof of the mutual consent of the parties. If such acts cannot be proved, then the contract fails, for whatever may have been in the minds of the parties, or however mutual their unexpressed wishes may have been, they will not suffice to create a contract unless manifested by some overt act. The mental state in itself signifies nothing; it requires manifestation.

If, on the other hand, it can be conclusively proven that mutual consent is lacking, the performance of the acts will amount to nothing toward es-

¹ *Gill Manfg. Co. v. Hurd*, 18 Fed. Rep. 673 [1883]; *Pullman Palace Car Co. v. Tex. & Pac. R. Co.*, 11 Fed. Rep. 625 [1882]; *Greve v. Gauger*, 36 Wis. 369; *Shields v. Hickey*, 26 Mo. App. 194 [1887].

² *Hynes v. Wright*, 62 Conn. 323; *but see Sheffield Fur. Co. v. Hull Coal & Coke Co. (Ala.)*, 14 So. Rep. 672.

³ Langdell's Summary of Law of Contracts 1090.

* See Sec. 183, *infra*.

tablishing a contract. An offer must be a physical and mental act combined, the mental act being embodied in, represented by, and inseparable from the physical act. If the mental act becomes impossible, then the offer comes to an end, as in death or insanity, either of which during the pendency of an offer makes the contract impossible for want of mutuality.¹

As an instance, suppose an engineer draws up two contracts for the approval of his company, both of which are signed and sealed, and the company elects to deliver one of the instruments, but by mistake delivers the other instead, then there is no contract.² There must be a definite understanding between the parties as to all the elements of the contract.³

90. There Should be No Misunderstanding.—A material error as to the kind, quantity, quality (?), or price of the subject-matter may make the agreement void, either because there was never any real consent of the parties or because the things or state of things to which they consented does not exist or cannot be realized.⁴ Therefore it was held no contract when a telegraph-operator by mistake made an order for three rifles to read as an order for fifty rifles.⁵

A mistake as to the person with whom the contract is made has been held to invalidate it where it was shown that the contractee never intended to contract with the person who assumed to be the contractor.⁶ A mistake as to which of two things was the subject of the sale will render the obligation not binding. Thus in the description of an estate sold, if the description include a piece of land not intended to be included in the sale, then there is no mutual understanding, and therefore no contract.⁷ Another instance is afforded where materials were bought to arrive by a certain ship *Peerless*, which the contractor supposed to be a vessel that sailed from a distant port in October; but there were two ships named the *Peerless*, the one meant by the seller sailing in December, and it was held that there was no binding contract, because there was a mistake as to the subject of the proposed sale.⁸

A contract will not be enforced when it appears to have been based on the supposed existence of a certain fact which furnished the motive for

¹ Langdell's Summary of Contracts, 1091.

² A contract is completed by delivery. There was no contract as to the one delivered, for there was no consent; not as to the other contract, because there was no delivery to evidence the assent. Langdell's Summary 170. [It might be a very difficult matter of proof, however.—ED.]

A contract signed by both parties and left with the engineer or architect for their joint benefit has been held a good delivery. *Coe v. Lehman*, 79 Ill. 177; *Blanchard v. Blackstone*, 102 Mass. 346.

³ *Hubbard v. Thompson*, 25 Fed. Rep. 188 [1885]; *Sibley v. Felton* (Mass.), 31

N. E. Rep. 10.

⁴ *Pollock on Contracts* 433; *Hopkins v. Hinkley*, 61 Md. 584; *Rogers v. Walsh*, 13 Neb. 28; *Gibson v. Pelhie*, 37 Mich. 380; *Lamar Milling & Elevator Co. v. Craddock* (Colo. App.), 37 Pac. Rep. 950.

⁵ *Henkle v. Pape*, L. R. 6 Ex. 7.

⁶ *Boulton v. Jones*, 2 H. & N. 564; *Boston Ice Co. v. Potter*, 123 Mass. 28; but see *Benjamin on Sales* 372.

⁷ *Calverly v. Williams*, 1 Vesey Jr. 210; *Pollock on Contracts* 430, 431, and cases cited.

⁸ *Raffles v. Wichelhaus*, Langdell's Select Cases on Contracts 39.

entering into the agreement if it subsequently transpires that the assumption on which the contract was based was erroneous.¹

An agreement by the owner of a patent for certain machines to furnish to another "such a number of machines as he desires for his own use at present or hereafter" was held void for want of mutuality.²

An error as to *quality* will not suffice to make a transaction void unless it is such that, according to the ordinary course of dealing and use of language, the difference made by the absence of quality wrongly supposed to exist amounts to a difference of kind, and furthermore the mistake must be common to both parties,³ or it may be a mistake on one side and fraud on the other. As Mr. Dickson says in his notes to Pollock on Contracts: "The law tolerates a good deal of lying in trade when it is merely in the nature of puffing one's own goods or deprecating those of another, provided the thing bargained for reveals its own qualities and is open to the parties' equal inspection."⁴

It has been held that executed contracts are obligatory without regard to mutuality.⁵ The fact that it is left optional with one party whether he will enforce his rights under the contract is not a ground for a defense of want of mutuality by a party who has received the benefit;⁶ but an agreement which is void as against public policy does not give one party the right to sue for damages for failure of the other party to perform his part, though the first party has performed his part.⁷

If a misunderstanding as to the price to be paid be proven no obligation will be created. Thus when a watchman was employed at one dollar and a half per day, and nights the same, and the employer understood him to say and mean one dollar and one-half for every twenty-four hours, while the watchman meant that amount for a day of twelve hours, it was held that there was no contract, because the parties had never assented to the same thing; that the watchman had never consented to work for one dollar and a half per twenty-four hours nor the employer to pay three dollars, but that, the watchman having performed the services, he was entitled to recover what they were reasonably worth.⁸

In another case where shingles were bought at a price agreed upon, but there was a dispute as to whether the shingles were by the "bunch" or by the thousand, it was held that unless both parties had understandingly

¹ *United States v. Charles* (C. C. A.), 74 Fed. Rep. 142.

² *Columbia Wire Co. v. Freeman Wire Co.* (C. C.), 71 Fed. Rep. 302.

³ *Pollock on Contracts* 436; *American cases cited in the Blackstone edition* [1888].

⁴ *Poland v. Brownell*, 131 Ma s. 138; *Armstrong v. Huffstutler*, 19 Ala 51; *Hill v. Bush*, 19 Ark. 522; *Bell v. Henderson*, 6 How. (Miss.) 321.

⁵ *Grove v. Hodges*, 5 P. F. Smith 504.

⁶ *Waterman v. Waterman*, 27 Fed. Rep. 827.

⁷ *Kountz v. Flannagen* (Sup.), 19 N. Y. Supp. 33.

⁸ *Turner v. Webster*, 24 Kan. 38 [1880]; *Tucker v. Preston* (Vt.), 11 Atl. Rep. 726 [1888]; *Vogel v. Pekoe* (Ill. Sup.), 42 N. E. Rep. 386.

agreed to one of these views as to quantity, then there was no special contract as to price.¹ There is no contract unless the parties thereto assent, and they must assent to the same thing in the same sense.^{2*}

An interesting case is reported in Maine, where a contractor proposed to erect a schoolhouse for \$4550, as per plans and specifications, and, being the lowest bidder, the committee awarded the contract to him for \$4525 and made it a matter of record, and required a bond for that amount for the completion of the work, also forfeiture for delays, etc. During construction trouble arose as to the erection of the building, and the court held that there had been no contract between the parties.³

In order to have a contract, the minds of the parties must meet and all the terms of the contract must be agreed to. If any part of the contract is not settled by the parties, or a mode agreed upon to settle it, there can be no contract as to that part.⁴

A memorandum reciting that a company has engaged an employee "for the season 1890-1891 at a salary of \$75 per week, subject to the regulations and conditions of a contract to be substituted for the memorandum," is not a contract. There is no meeting of the minds of the parties as to the conditions, restrictions, and regulations mentioned.⁵

91. To Avoid a Contract Mistake or Misunderstanding Must be Shown Conclusively.—It may seem to the reader that such rules of law would enable any man to escape the obligation he has assumed, but it is thought not. The misunderstanding, as to the parties, thing, quantity, or price of the property, material, or goods sold or contracted for, must be of such a nature as a reasonably diligent man might fall into in order to relieve him from the performance of his contract, and that he did misunderstand and that there was no mutual consent he must satisfy twelve jurymen.⁶

If a proposal was misunderstood by an acceptor it is for him to show that the misunderstanding was reasonable. A contractor cannot be allowed to evade the performance of his contract by the simple statement that he has made a mistake or did not understand. If the owner or contractor at the time he executes the contract conducts himself so as to lead a reasonable man to believe that he understands and assents to its terms, and the contractor or owner executes and performs his part under that belief,

¹ *Greene v. Bateman*, 2 Woodb. & M. 239.

² 1 *Parsons on Contracts* 389; and see *Flaherty v. Miner*, 123 N. Y. 382, in which case it was claimed that the clause for architect's certificate was inserted by mistake. A strong architectural case. It is submitted that this question of quantity might frequently be determined by the custom or usage of the place.

³ *Howard v. School*, 78 Me. 230; and see *Hughes v. Clyde*, 41 Ohio St. 339; also

Verzan v. McGregor, 23 Cal. 339, where the contractor made a mistake in estimating amount and difficulty of work.

⁴ *Gill Man'g. Co. v. Hurd* (Ohio), 18 Fed. Rep. 673 [1883]; see *Lyndon Mill Co. v. Lyndon Lit. Inst.*, 63 Vt. 581, where the owner supposed the contractor was furnishing the materials as a gratuity.

⁵ *Walton v. Mather* (City Ct.), 24 N. Y. Supp. 307.

⁶ *Pollock on Contracts* 432.

neither party can assert that he did not understand or assent to its terms.¹ Where the written draft of a contract is viewed as the consummation of the negotiations there is no contract until it is finally signed.² The burden of proof is on one affirming the completion of the contract before the written draft thereof was signed to show that the signing was not necessary to its completion.³ A statement by plaintiff in his answer accepting the rate, and saying that he would be down the first of the week and make out a contract, does not prove that he did not suppose that his letter perfected the contract.⁴

A demand for a sleeping-car berth and a promise to furnish it constitute a contract, the mutual obligations and promises being a valid consideration.⁵ The same is true of a verbal application for cars of a railroad agent, who replies "*All right*," and makes an order for the cars. Such facts proven are sufficient to show that the minds of the parties met and that a contract was made.⁶

The mistake in executing a contract need not always be mutual in order to invalidate it.⁷

If there is a mutual mistake as to the existence of the subject-matter, as in the sale of a farm and buildings the latter of which were burnt, the vendor cannot recover the contract price.⁸

92. Manner of Coming to an Understanding—Offer and Acceptance Make a Contract.—The manner and method of parties reaching this mutual understanding are essentially various, but probably the most common way of evidencing a mutual consent to the terms of an agreement is by offer and acceptance; by one party making a statement of the terms by which he will abide in the shape of an offer, and then, while he is in that state of mind, *i. e.*, before he has expressed himself to the contrary or made a revocation of his offer, the other party accepting his offer unconditionally, in the same terms as made. Then is there a meeting of the minds, and from the moment of that acceptance there is a binding contract. Such an agreement is usually introduced by some questions as to whether a thing is for sale or to be performed; or the disposition to contract may be evidenced by a notice or advertisement that a certain sale is to take place or a thing is to be disposed of or that certain work is to be performed, inviting offers, pro-

¹ Phillip v. Gallant, 62 N. Y. 256.

² Steamship Co. v. Swift, 29 Atl. Rep. 1063, 86 Me. 248; *but see* Sanders v. Pottslitzer Bros. F. Co. (N. Y. App.), 39 N. E. Rep. 75.

³ Mississippi & Dominion Steamship Co. v. Swift, 86 Me. 248.

⁴ Lawrence v. Milwaukee, L. S. & W. R. Co. (Wis.), 54 N. W. Rep. 797. *See* Sec. 797.

⁵ Pullman P. C. Co. v. Booth (Tex.), 23 S. W. Rep. 719.

⁶ Pittsburgh, etc., Ry. Co. v. Racer (Ind.), 38 N. E. Rep. 186.

⁷ Foster v. Mackinnon, L. R. 4 C. P. 704, 711; Pitcher v. Hennessy, 48 N. Y. 415.

⁸ Wells v. Calman, 107 Mass. 514 [1871], *cases cited*. *But see* Harvard Law Professor's doctrine in Harvard Law Review, and an article on the effect of destruction of buildings on contract for sale of the property, 12 Central Law Journal 77, by E. A. Marshall.

posals, or tenders. This preliminary is then followed by a certain amount of fencing and bantering as to who shall first commit himself to the terms of an agreement. If it is a horse to sell, the seller will want the purchaser to make him an offer. He wants the highest price he can get for his horse, and if he makes an offer it may be accepted, which completes the contract, and he may have named a figure lower than he could have obtained had he been a little more prudent. If the seller gets the buyer to make him an offer, it is then in his hands to close the bargain and make it a sale or to reject it. If the offer be accepted before the buyer revokes his offer, then the contract is completed, and the would-be purchaser is bound by the agreement.

This desire to be noncommittal, or to keep the privilege of closing the contract, has given rise to auction sales and of letting work by advertising for bids, proposals, or tenders, by which means the owner or proprietor retains the right to determine the contract, and contracts are entered into in a manner more dignified and businesslike than those attending every-day bargaining.

The subject of offer and acceptance presents many nice questions as to *what* is an offer, *what* constitutes an acceptance, at *what* moment the acceptance takes effect and the offer becomes irrevocable, and *what* effects a revocation of an offer.

93. What Is an Offer?—An offer is a proposal to make a promise, and in law it is not an offer until it comes to the knowledge of the person to whom it is made. The offer must be made in the form of a proposal to become binding upon acceptance. An offer in the form of a question, as, "Will you or would you take or accept \$10 a thousand?" is not an offer at all. The offer must be in such terms that if accepted both parties shall be bound, that the obligations may be mutual. Had the would-be purchaser said, "I will give you \$10 a thousand," and the seller signified his assent by accepting the offer or by delivering the materials, that would have made a valid contract.

An offer has been called a conditional promise which may be revoked at any time before it is accepted. It is not a promise, for it is revocable, while a promise is not; but if it is accepted in due course of time, *i. e.*, within a reasonable time, and in the precise terms that it was made, it then becomes a promise, and the offer and acceptance becomes a promise for a promise, which constitutes a contract.

In bilateral contracts where the offer and consideration are mutual promises, the offer becomes a promise only upon the acceptance and performance of the consideration, *i. e.*, the giving of a promise in return for the promise offered. It therefore follows in a bilateral contract that if one party is bound both are bound, and both must have become bound at the same time. In a unilateral contract where the offer is made in consideration of an act or material thing, the offer becomes a promise "in consequence

of what the contractor does or gives or suffers," while in a bilateral contract the offer becomes a binding promise "in consequence of what the contractor says," promises. Therefore the acceptance in a bilateral contract must amount to a promise or the adoption of the terms imposed in the offer as the consideration for the obligation assumed by the offerer. The adoption of the terms and the promise by the contractor and the continuance of the offer and the counterpromise by the one making the offer are implied by the law. The law implies the making of the counter offer in the terms of the original offer when the acceptance is made, and also imposes upon the offerer the presumption that he has remained in that state of mind so long as his offer continues, and that he will accept the counter offer in the same terms of his own offer.

In treating the subject of offer and acceptance it seems essential to distinguish between these two classes of contracts: those that are one-sided—unilateral, and those in which both sides are bound to perform, or bilateral contracts.

94. What Constitutes an Acceptance?—The acceptance differs from the making of an offer in that it is not always necessary to communicate it to the person making the offer. The acceptance of an offer may be expressed by words or signs, as by the acts of the parties; for example, the delivery of the materials or goods, or by accepting and using them, or by any overt act that indicates in the ordinary course of trade or business an acceptance of the terms offered. For all practical purposes it may be said that the offer is accepted when the person to whom the offer has been made has performed the conditions, *i. e.*, the consideration stipulated in the offer. The entering of an order on the books of a firm may constitute the acceptance and create a contract.¹

In a public offer of a reward for the apprehension and conviction of the perpetrators of an act, the offer is accepted by the discovery and arrest of the culprit, unless, indeed, the act was done in ignorance of the reward having been offered. If such is the case it is no contract, because the offer had never been communicated to the apprehender. If an offer be made in consideration of the performance of certain acts the offer does not become a promise until the performance of the consideration is completed, and up to that moment the offer may be revoked or destroyed by the death of the one making the offer, and the offeree (contractor) be deprived of any pay for what he had done. Thus an offer in the terms, "If you build me a house according to these plans and specifications, on its completion I will pay you \$10,000," would, it seems, allow the owner to back out and revoke his offer at any time before the house was finished, and leave the contractor without any remedy for his work and materials under the terms of their

¹ *Camden Iron Wks. v. Fox* (N. J. C. C.), 34 Fed. Rep. 200 [1887].

would-be agreement.¹ This might cause great hardship and gross injustice on the contractor; but if it were held that the offer became a promise when the contractor began the performance of the consideration, it would be contrary to the manifest intention of the parties as shown by the terms of their agreement; and it would impose hardships upon the offerer (owner) when the contractor, as he might at any stage of the work, refuse to proceed further in performing the consideration of the offer. If the contractor should die, the offerer (owner) would then be without remedy. These troubles and hardships may be averted by making a binding contract before the work or performance begins, by giving an offer of a promise to pay, for a promise to perform, *i. e.*, by an exchange of mutual promises. If the parties neglect this precaution, any hardships they may suffer should be charged to themselves.

95. Contracts Made by Mail or Telegraph.—It is the acceptance of an offer that completes a simple contract, and it is the delivery of the instrument that makes a deed. The offer is supposed to continue till the time of its acceptance, for the offer and acceptance must exist at the same time, the moment when the contract is created. Thus when an offer is made by letter or by telegram, the offer is continued during the time that the letter or message is travelling, unless it is recalled or revoked, which revocation must be communicated to the person to whom the offer was made or sent.

It is frequently and popularly stated that the mailing of a letter of acceptance completes the contract, and it is frequently held by courts that an offer is accepted from the time the answer is deposited in the post-office.* It has been held too that a telegraph message containing an acceptance of an offer delivered on Saturday to the telegraph company, and required to be delivered on Sunday to the offerer, is wholly completed on Saturday, and not void because of Sunday laws.* It is pretty well settled in this country and in England that a contract is completed at the moment the letter of acceptance is mailed, or the message of acceptance delivered to the telegraph company.⁴

¹ In such cases the law implies a contract on the part of the owner to pay the reasonable value of the contractor's services and materials. If the owner request a contractor or mechanic to perform certain work or to furnish materials, or if, without any request, the owner stands by and allows the contractor to do work or furnish materials, acting in good faith, and the owner takes possession of the materials and work and enjoys the benefit thereof, the law will imply a contract on his part to pay for such work and materials. *Thomas v. Walnut Land, etc., Co.*, 43 Mo. App. 653; *Henderson B'dge. Co. v. McGrath*, 134 U. S. 260; *Richard v. Stanton*, 16 Wend. (N. Y.) 25; numerous cases cited, 29 Amer. & Eng. Ency. Law

864-6. The work must have been performed with the owner's knowledge, consent, privity, or by his request. It must not have been done officiously, or no recovery can be had, however meritorious or beneficial it may be to the owner.

² *Hunt v. Highman (La.)*, 30 N. W. Rep. 769 [1886].

³ *Western Union Telegraph Co. v. Way (Ala.)*, 4 So. Rep. 844 [1887].

⁴ *Trevor v. Wood (N. Y.)*, 16 Am. Law Reg. 215 [1868]; *Terrier v. Storer*, 19 N. W. Rep. 288 [1884]; *Adams v. Lindsey*, 1 B. & A. 681 [1818]; *Dunlop v. Higgins*, 1 H. of L. Cas. 381 [1848]; *Thomson v. James*, Langdell's Cases on Contracts 125; Langdell's Summary of Contracts 993.

The soundness of this rule has been questioned by good authority, who argue that the acceptance must be communicated to the original offerer to complete the contract, and this seems to be the Massachusetts rule.¹ The latter rule seems to be sustained by the decisions to the effect that if a letter or message of revocation is received by the offerer before or at the same time he receives the letter of acceptance the revocation will render the acceptance inoperative, even though the letter was mailed before the revocation was sent. If the letter of acceptance be followed by another letter, not revoking but modifying the acceptance, and the two are delivered at the same moment, the later letter will take effect, no matter which letter happens to be opened first.² The cases cited would seem to hold that a contract is not consummated at the moment the letter or message of acceptance is sent if the contractor can get his revocation to the offerer before or by the time the acceptance is delivered.

Proof that a letter was duly stamped and addressed and mailed is *prima facie* evidence that the person to whom it was sent received it³ if it appears that he then resided in the town to which the letter was addressed,⁴ and the delivery of a letter to a mail-carrier is equivalent to depositing it in the post-office.⁵

96. Acceptance Must be Unconditional and in the Same Terms as the Offer.—The acceptance must be absolute, positive, and unconditional. An offer can be accepted only in the terms in which it is made, and if the acceptance modifies the offer in any particular it is not an acceptance that will create a contract, but is a counter-offer. Therefore where a quantity of tin was offered at a certain price, and the reply was: "We accept your offer if full-weight plates," it was held that the acceptance was conditional and did not constitute a contract.⁶ A letter reading, "I am prepared to make the arrangements with you on the terms you name," in answer to a letter of proposal, does not constitute an unconditional acceptance.⁷

If the terms of the offer are not restated in the acceptance, the parties will be bound by the terms of the offer. Thus where a railroad offered to carry logs at a certain rate, the shipper to chain the logs if necessary for safety, which rate was accepted, it was held that by accepting the rate without qualification the shipper accepted all the conditions specified by the railroad company.⁸

An offer must be accepted just as it was made, and without modification or qualification. A qualified acceptance of an offer, *i. e.*, an acceptance in terms that differ from those in which the offer was made, becomes a new

¹ Langdell's Summary of Contracts 993.

² Langdell's Summary of Contracts 996.

³ *McFarland v. U. S. Mut. Acct. Assn.* (Mo. Sup.), 27 S. W. Rep. 436; *Young v. Clapp* (Ill. Sup.), 35 N. E. Rep. 372.

⁴ *Goodwin v. Provident Sav. Life Assur. Soc.* (Iowa), 66 N. W. Rep. 157.

⁵ *Pearce v. Langfitt*, 101 Pa. 507 [1883].

⁶ *Kirwin v. Byrne* (Com. Pl.), 29 N. Y. Supp. 287; 27 N. Y. Supp. 143, *affirmed*.

⁷ *Havens v. American Fire Ins. Co.* (Ind. App.), 39 N. E. Rep. 40.

⁸ *Lawrence v. Milwaukee, etc., R. Co.* (Wis.), 54 N. W. Rep. 797.

offer, which the original offerer may accept and thus complete the contract. The acceptance must conform to the conditions expressed or implied in the offer in respect to time, place, manner, and method in which it is given or made.

The acceptance must be made or mailed within the time named in the offer, and if no time be named, within a reasonable time, which latter will depend upon the circumstances and is a question of fact for the jury.¹ If the offer requires the acceptance to be sent to a particular place, a letter of acceptance sent to another place will not create a contract.² An offer containing a request to answer by telegraph "yes" or "no," and stating that unless the answer is received by a certain day "shall conclude no," the acceptance must be received by telegram on or before the date named.³

If the offer is neither accepted nor rejected, but a new offer made in turn, it amounts to a constructive rejection of the original offer.⁴ If the first offer is afterwards accepted, it does not create a contract, but is only a new counter-offer which may be accepted or rejected by the original offerer.⁵

97. What Effects a Revocation of an Offer.—An offer must be communicated to the offeree, and it can be revoked only in the same manner. It may be withdrawn at any time before it is accepted, but the withdrawal must be brought to the knowledge of the party to whom it was made.⁶

It is not to be supposed that the offeree can leave town or secrete himself and thus avoid a revocation of an offer, for a letter withdrawing the offer, properly directed, with a return notice thereon, and mailed in time to reach the person to whom the offer was made before his letter of acceptance was mailed, will be held to have been received in the absence of strong proof to the contrary.⁷

In the case of an offer the offerer holds control of it and may call it back or revoke it, but once accepted the promise is made and the offerer has parted with his control of the offer and it is irrevocable. It can then be rescinded only by the mutual consent and agreement of both parties, *i. e.*, by another contract that they will not enforce their rights.⁸

A mere change of mind on the part of the offerer will not destroy an offer. It requires some physical act on his part to undo the making of the offer, and the physical act must be brought to the knowledge of the person to whom the offer was made.* An offer to sell materials is not revoked by sell-

¹ *Ferrier v. Storer*, 19 N. W. Rep. 288 [1884].

² *Ellison v. Henshaw*, 4 Curtis 382 [1819].

³ *Lewis v. Brownlee*, 130 Mass. 173 [1881]; *Horne v. Niver* (Mass.), 46 N. E. Rep. 393.

⁴ *Hyde v. Wrench*, 3 Beavan 334.

⁵ *Sheffield C. Co. v. Sheffield & R. Ry. Co.*, 3 Ry. & C. Cas. 121; *W. & H. M. Goulding v. Hammond* (C. C. App.), 54 Fed. Rep. 639. When and under what

conditions silence or a failure to reply will amount to an acceptance of an offer, see 27 Am. Law Reg. N. S. 260 [1888]; *Tyler v. Tuatlin Acad. etc.*, 26 Am. Law. Reg. 339 [1887].

⁶ Langdell's Summary 1090; *Sherwin v. Nat. C. R. Co.* (Colo. App.), 38 Pac. Rep. 392.

⁷ *Sherwin v. Nat. C. R. Co.*, *supra*.

⁸ *Foster v. Dabber*, 6 Ex. Ch. 851; *Mornetz on Corporations*, § 871.

* See Mutuality, Sec. 89, *supra*.

ing them to some one else.¹ The offer continues and may be accepted at any time before it is revoked and its revocation is brought to the knowledge of the offeree. The offeree and the purchaser of the materials cannot both acquire title to the materials, but as against the seller they can both acquire the right to the goods, together with the alternative right to damages, which is all that a contract secures to the contractor in any case.² In the case of a specific chattel where the title passes immediately upon the acceptance of the offer doubtless the person who first completes his contract with the seller will get title to the goods, and may retain possession of them; but when the offer is to sell real property or unspecified personal property it may be doubted whether a subsequent sale of the property, whether executed or executory, would have any effect upon the contract created by accepting the offer.³

It is often held that a definite proposal to do work according to plans and specifications plus an unqualified acceptance by a city together constitute a contract, and the plans and specifications become a part of it.⁴ But there are other decisions to the effect that the acceptance of a legally made bid for a proposed building does not in itself constitute a contract, but that the bidder is entitled to a contract in accordance with the terms of his proposal.⁵ *

The distinction is a nice one, to say the least, and it is doubtful if it is worth making, as the contractor's rights and claims are substantially the same in either case. If no new terms are contemplated and the acceptance is unqualified, there is no doubt a binding contract. If from the circumstances there is an evident intention to enter into an agreement, and the preparation of the written contract was postponed as a matter of convenience and for the purpose of expressing in more formal language the agreement already arrived at, the contract will be considered as completed when accepted, and must be performed according to the terms of the proposal.⁶ An intimation in the written acceptance of a proposal that a contract will be afterwards prepared, does not prevent the contract from taking effect.

Care should be taken not to accept bids absolutely, but only on condition that the builder sign the contract and specifications in their prescribed forms, finding securities and executing the required bonds, etc. If the acceptance be made "subject to the execution of a contract to be prepared," or "subject to the preparation and approval of a formal contract,"⁷ or "subject to the conditions and regulations of a contract to be substituted for this memorandum," the contract will not take effect until it has been

¹ Query: if the offeree had been apprised of the sale by the purchaser would it revoke the offer.

² Langdell's Summary of Contracts 1091.

³ Denton v. City of A., 34 Kan. 438 [1885]; Wiles v. Hoss (Ind.), 16 N. E. Rep.

800 [1888].

⁴ Hughes v. Clyde, 41 Ohio St. 339.

⁵ Lewis v. Brass, L. R. 3 Q. B. D. 667;

Lawrence v. M. L. S. & W. R. Co., 54 N. W. Rep. 797.

⁶ Winn v. Bull, L. R. 7 Ch. Div. 29.

* See Lowest Bidder, Secs. 182-3, *infra*.

formally executed.¹ In each case the evident intention of the parties will hold in determining whether the contract was completed, or whether it was intended to complete it on some later occasion.

An offer which is to continue or remain open for a time named is only an expression of the intention of the parties, and fixes the length of time it shall continue, provided it be not revoked in the meantime. To make such a stipulation binding it must be supported by a consideration or be expressed in a sealed instrument. Even then the offer may be revoked, which act on the part of the offerer would give to the other party a right to damages for the breach of his contract to keep the offer open. A court would not enforce the execution or completion of the contract.²

If a dealer agrees with a contractor in consideration of \$1 that the contractor shall have the refusal of certain materials for one month for \$5000, the law supposes the dealer to offer the materials to the contractor for \$5000 and to stipulate that the offer shall continue for one month. If the contractor revoke the offer, then he becomes liable for the damages the contractor suffers in consequence, which would probably be the difference between the price agreed upon and the price at which the contractor could have bought.³*

¹ *Walter v. Walther* (City Ct.), 24 N. Y. Supp. 307; *but see* Emden's Law of Building 58.

² Langdell's Summary of Contracts, 1089.

³ Langdell's Summary of Contracts, 1090.

* *See* Lowest Bidder, Secs. 132-199, especially Sec. 184, *infra*.

CHAPTER V.

LAW OF CONTRACTS. GENERAL STATUTES LIMITING THE LAW OF CONTRACTS.

STATUTE OF FRAUDS.

98. Proof of Terms of Contracts.—From what has preceded the reader has no doubt often wondered how certain things were to be proved. The existence of certain facts and the proof of them are two quite different things. The facts attending every contract must be viewed in the light shed by the evidence offered as seen by the jury. The facts ascertained, it is the province of the court to determine what laws are applicable and what rights belong to the parties. The most inexperienced will appreciate how difficult it must be to prove the terms of contracts by the parol evidence of the parties or by that of witnesses. The fallibility of men's memories and the frequent change of residence increase the difficulties as the time increases.

To prevent frauds and perjuries statute laws have been passed which require that important contracts be attended by certain ceremonies and overt acts by which they may be proved in courts, and on account of the loss of evidence after the lapse of time statutes have been passed limiting the liability of parties to certain periods or lengths of time. That the public may have notice of certain contracts and obligations, especially those pertaining to transfers of land and to important construction work some states require that they shall be made the subject of public record. In some states it is required that all contracts and specifications for construction of buildings and works shall be recorded with the registry clerk of the district.

99. Statute of Frauds.—In nearly all the states, in Canada, and England there are statutes requiring certain contracts to be in writing which are known as the Statute of Frauds. The statute arose from the necessity of having contracts in writing to prevent frauds and perjuries in proving the the contract ; hence its name. These statutes usually provide that contracts in which the consideration is more than £10 (or \$40 or \$50) cannot be enforced in courts of law if they are not in writing, or there has not been a part payment or a part delivery; and contracts for an interest in lands, or that cannot be performed within one year, or to pay the debt of another, are voidable if not in writing. The reasons and circumstances requiring the passage of such a statute law exist in construction contracts, and every prudent man will require a written contract for construction work.

When the statute provides that certain contracts should be in writing, it

is imperative that they should be so made. If such a contract is not in writing it can furnish no ground of action or basis of defense to either party, but they must stand as though no express contract had been made. The person rendering services may usually recover upon a *quantum meruit*,¹ but not upon the express contract.² If a contract is required to be in writing, all material variations of such contract must be in writing.³

The general requirements of the different statutes are the same for the different states, but there are slight differences which it is impossible to treat here. The advice of a local attorney should be sought for the interpretation and application of the statute of the different states, however, some general statements may be made and cases be given which will illustrate the working of the statutes.

100. Statute of Frauds.—Contracts for the Sale of Goods, Materials, and Merchandise.—The statute as enacted in nearly all the states of the Union has a section very similar to the following: "No contract for the sale of goods, wares, and merchandise for the price of [\$30 in New Jersey to \$300 in Utah] or more, shall be good or valid unless the purchaser accepts and receives part of the goods so sold or gives something in earnest to bind the bargain or in part payment; or unless some note or memorandum in writing of the bargain is made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

This section of the statute has been held to govern all forms of selling goods, as at auction, and to extend to every manner of private sale.⁴ It applies to contracts for exchange, barter, and to executory as well as executed sales;⁵ but a contract to give a chattel mortgage or a contract to become a partner in the sale has been held not within the statute.⁶

101. Contract for Goods to be Manufactured.—If the subject-matter of goods contracted for or sold has no existence and is to be manufactured, then the law varies in different states. Some hold that such a contract is within the statute, and other states hold it is merely a contract for work and labor. The latter doctrine is often called the New York rule; but there is a tendency to get away from it, even in the State of New York. If a contract be for the sale of an article which requires the personal skill or attention of the seller, it is a contract for work and labor; the test frequently applied being whether the seller is himself to manufacture them or to procure some particular person, or whether a delivery of goods by any one will satisfy the contract. If the latter, then it is a contract for the sale of goods. Other cases make the test one of design and purpose, holding that if the article manufactured is to be of special or peculiar design and not

¹ *Salb v. Campbell* (Wis.), 27 N. W. Rep. 45; *Cohen v. Stene* (Wis.), 21 N. W. Rep. 514.

² *Lanham v. Osborne* (Nev.), 18 Pac. Rep. 881 [1888].

³ *Malone v. Philadelphia* 147 Pa. St. 416.

⁴ *Davis v. Robertson*, 1 Mill. 71; *Davis v. Rowell*, 2 Pick. 64.

⁵ 8 Amer. & Eng. Ency. Law 704.

⁶ 8 Amer. & Eng. Ency. Law 705.

suitable for general trade, then it is *not* within the statute.¹ Therefore a contract to furnish a monument for a certain amount, to be erected by a state on a battlefield, was held not a contract for sale of goods, within the statute of frauds, though the contractors were not bound to bestow their personal skill and labor thereon.² An agreement to take down a building and reërect it on another lot was held not a sale of goods, but an agreement for labor and to improve real estate.³ A verbal contract to furnish material, and, after performing labor thereon, to attach it to the realty, as a part of a building in the course of construction, is not a sale of goods or chattels, and is not within the statute.⁴ *

There is a safe road to travel in all such cases, and that is the surest though it be the longest. Adopt a steadfast rule of committing the terms of every contract to paper, and avoid the question and litigation consequent to a failure to adhere to the rule. The object of this book is not to get its readers out of trouble, but if possible to teach them to avoid trouble and litigation.

In the United States the statute is held to apply not only to personal chattels and ordinary goods, wares, merchandise, and materials, but also to stocks of corporations, bank and promissory notes, book accounts, and bond-scrip, but not, it seems, to an interest in a patent right.⁵

The burden of proving that the price exceeds the sum named in the statute rests upon the party setting up the statute in his defense, and where many articles or different materials are bought at the same transaction the aggregate price of the whole is the price to be considered.⁶

102. What is a Sufficient Memorandum of a Sale.—The note or memorandum need not be an agreement or contract, but it must contain the essential terms of the contract. It must show who are the parties, what was the subject-matter of the contract, the quantity, price, and any special terms agreed upon. The memoranda may be contained in several papers, as in the ordinary exchange of letters in correspondence. A written offer or proposal is sufficient if accepted. A bill of parcels, a receipt for money, a vote of a private or municipal corporation duly entered on its books,⁷ or a series of letters or of telegrams put together, may make the necessary memorandum. Where connection is to be established between separate papers they must contain references to one another or be physically joined together. Parol evidence should not be necessary to establish their connec-

¹ *Brown & H. Co. v. Wunder* (Minn.), 67 N. W. Rep. 357.

² *Forsyth v. Mann* (Vt.) 34 Atl. Rep. 481.

³ *Scales v. Wiley* (Vt.), 33 Atl. Rep. 771.

⁴ *Brown & H. v. Wunder* (Minn.), 67 N. W. Rep. 357; and cases in 29 Amer. & Eng.

Ency. Law 860; *Lee v. Griffin*, 1 B. & S. 272; *Clay v. Yates*, 1 H. & N. 73.

⁵ *Grigsby v. Fombs* (Ky.), 21 S. W. Rep. 37; 8 Amer. & Eng. Ency. Law 710.

⁶ 8 Amer. & Eng. Ency. Law 710.

⁷ 8 Amer. & Eng. Ency. Law 712; *Camden I. Wks. v. Fox*, 34 Fed. Rep. 200 [1887].

* See Sec. 106, *infra*.

tion with the contract. If all the papers be signed they need not refer to one another, but all must refer to the contract. Parol evidence may be introduced to identify the papers, but not to connect them.

The memorandum may be printed, made in pencil or stamped; it need not be delivered to the opposite party, nor need it be published. It is sufficient that a written memorandum was made and signed by the party to be charged. If lost its contents may be proved like those of any writing.¹

103. Contracts to be Performed within One Year.—The statute usually provides that no action shall be brought upon any agreement made, which by its terms is not to be or *cannot be* performed within one year from the date of the making thereof unless the agreement, or some sufficient memorandum of it, be in writing and duly signed.

In construing this act the courts have held that if the contract can by any possibility be performed or completed within a year according to the intent of the parties, then it is not within the statute and is not required to be in writing. The mere expectation or supposition of the parties as to when the contract will be completed does not determine the intent. However unlikely or impossible it may appear that the contract will not be performed, if it be *possible* to perform it (not terminate it), it is not within the statute. When the performance within a year is impossible it must be in writing or there must be a written memorandum.² Agreements to do an act more than a year hence; to continue to do an act or service or to refrain from doing it for a greater period than one year; to take a lease for more than one year or for a year, the same to begin at some future day; to serve or employ for more than a year or for a year, the service to begin at some later day; and all contracts in which it is evident that they cannot be performed according to the express intent of the parties within a year, are within the statute. An oral agreement to make annual payments in a contract which by its terms is to continue sixteen years is within the statute, and cannot be enforced;³ but it might be otherwise if the contract were completely performed by the debtor.⁴

The following instances will serve to show what agreements are not within the statute, and, if not subject to the restriction of other sections of the statute, need not be in writing: A verbal contract to construct a road or house within a year and twenty days from the date thereof was held valid, as it *might be* completed within the year.⁵ The same has been held of an agreement dated June 5, 1883, for the erection of a structure to be put up

¹ 8 Amer. & Eng. Ency. Law 710-728.

² Warren Co. v. Halbrook, 118 N. Y. 586, 16 Amer. Repts. 788; Lockwood v. Barnes, 3 Hill 128; Jilson v. Gilbert, 26 Wis. 637; Doyle v. Dixon, 97 Mass. 208, 93 Amer. Dec. 80, and note; 8 Amer. & Eng. Ency. Law 686; Sarles v. Sharlow

(Dak.), 37 N. W. Rep. 749 [1888], and note.

³ Jackson Iron Co. v. Negaunce C. Co. (C. C. A.), 65 Fed. Rep. 298.

⁴ Weatherford, etc., R. Co. v. Wood (Tex.), 29 S. W. Rep. 411.

⁵ Jones v. Pouch, 41 Ohio St. 146 [1884];

part during the season of 1883 and part during the season of 1884;¹ and of an agreement to work a quarry and to divide the profits, no time being specified.²

If the promise depend upon the happening of an event which *may* not happen within a long time, but which *has* happened within a year, the agreement is good and will sustain an action.³ A verbal contract to deliver ties, timber, etc., on the line of a railroad, to be inspected once a month, and, if received, to be paid for at current prices, the contract to continue until the contractor is notified to stop, is not within the statute;⁴ and so also of an agreement to continue to supply materials as long as wanted.⁵ An oral agreement between a father and a son by which the son is to support his parents during their lives is not within the statute, as it may be performed within a year;⁶ but a verbal agreement whereby a railroad company undertakes to lay a switch for the use of a sawmill-owner, and to maintain it as long as he should need it, was held within the statute when it was expected and understood that he would need it for many years.⁷

When it is expressly agreed that a contract is to be performed within one year, extension from the date of completion from time to time by parol for periods less than one year will not be effected by the statute of frauds.⁸

104. Contracts Executed or Completed by Contractor.—If the contract is executed by one party it does not come within the statute of frauds. Therefore a contract to build a house for \$2400;—\$500 when the house is begun, \$500 when the house is finished, and the residue in five yearly payments, with interest payable semi-annually, was held not within the statute, the contract having being wholly performed by the contractor within a year. The contract had been reduced to writing, but never signed.⁹ While this case may represent the general law, there are many cases to the contrary in Massachusetts,¹⁰ New York, Vermont, and other states. If, however, the contract has been fully performed and accepted by one party to the enrichment of the other party, such cases may be supported on the ground that a contract is implied by law to pay for the same, and the contract is good evidence of the value of the performance or work done.

105. Contracts for Employment Not to be Completed within a Year.—Instances within the statute which are most likely to occur in the experi-

Plimpton v. Curtis, 15 Wend. (N. Y.) 336;
Fain v. Turner's Adm'r (Ky.), 29 S. W.
Rep. 628.

¹ Sarles v. Sharlow (Dak), 37 N. W. Rep.
749 [1888].

² Treat v. Hiles (Wis.), 32 N. W. Rep.
517.

³ 8 Amer. & Eng. Ency. Law 690.

⁴ Walker v. Railroad Co. (S. C.), 1 S. E.
Rep. 366 [1887].

⁵ Walker v. Johnson, 96 U. S. 424.

⁶ Carr v. McCarthy (Mich.), 38 N. W.

Rep. 241 [1888]; 8 Amer. & Eng. Ency.
Law 691.

⁷ Warner v. Texas & P. Ry. Co., 17 Sup.
Ct. Rep. 147.

⁸ Donovan v. Richmond (Mich.), 28
N. W. Rep. 516; 8 Amer. & Eng. Ency.
Law 688.

⁹ Durfee v. O'Brien, 14 Atl. Rep. 857
[1888]; Haines v. Thompson, 19 N. Y.
Sup. 184.

¹⁰ See 8 Amer. & Eng. Ency. Law 692.

ence of every engineer or architect are verbal contracts for employment by the year, which are usually made some time before the service begins. Such a contract, unless in writing, will not hold, and the employee may get his discharge any day and find himself without redress.¹ If the contract of employment as set forth in his written memorandum is incomplete, then the contract may fail. If, however, the service be by the year and has continued for one year, and as to the next year nothing has been said, a new implied contract may arise at the end of the first year's service, which the law will enforce though not in writing. The new contract implied by the law is a hiring from year to year, performed within a year, and therefore good.² A verbal agreement for a future term to begin at once and not exceeding one year is not within the statute.³

A contract for one year, to commence when the employee secures release from present employment, was held not within the statute, when it was possible to secure the release on the date of contract, though in fact the release was not secured till later.⁴ A verbal contract for steady and permanent employment is not void or within the statute, as it may be at an end any time upon the death of the employee.⁵ If the contract by its terms contains an option allowing either party to terminate it within a year, it is not within the statute and need not be in writing.⁶ If no definite time be agreed upon as to when the service shall terminate or how long it shall continue, it need not be in writing, but it were better to be in writing always.⁷

Contracts not to be performed within a year must be signed by both parties. If not signed,⁸ part performance will not take it out of the operation of the statute in an action at law,⁹ although it has been held a ground for relief in equity.¹⁰

¹ *Milan v. Rio Grande, etc., R. (Tex.)*, 37 S. W. Rep. 165; *Moody v. Jones (Tex.)*, 37 S. W. Rep. 379.

² *Smes v. Supt. (Mich.)*, 25 N. W. Rep. 485; *Cullis v. Bothamley*, 7 W. R. 87; *Leland v. Aldrich (La.)*, 6 So. Rep. 28, 8 Amer. & Eng. Ency. Law 687, 14 Amer. & Eng. Ency. Law 765; *Ball v. Stover*, 31 N. Y. Supp. 781; *Herman v. Littlefield (Cal.)*, 42 Pac. Rep. 443.

³ 8 Amer. & Eng. Ency. Law 687; *Whiting v. Ohlert (Mich.)*, 18 N. W. Rep. 219; *Raynor v. Draw (Cal.)*, 13 Pac. Rep. 866 and note; *Ward v. Mathews (Cal.)*, 14 Pac. Rep. 604; *Sharkey v. McDermoth (Mo.)*, 4 S. W. Rep. 107; *Franklin Sugar Co. v. Taylor (Kans.)*, 15 Pac. Rep. 586 [1888].

⁴ *Baltimore B. Co. v. Callahan (Md.)*, 33 Atl. Rep. 460.

⁵ *Penn. Co. v. Dolan (Ind. App.)*, 32 N. E. Rep. 802; *Harrington v. Kansas C. C.*

Ry. Co., 1 Mo. App. 135, "at a monthly salary, so long as he shall do the work assigned him" *Carter W. Ld. Co. v. Kinlin (Neb.)*, 66 N. W. Rep. 536, "so long as the works are kept running."

⁶ *Blake v. Voight (N. Y. App.)*, 31 N. E. Rep. 256 [1892]; but see *contra Doyle v. Dixon*, 97 Mass. 208; and see *Dobson v. Collis*, 1 H. & N. 81; and 8 Amer. & Eng. Ency. Law 692.

⁷ *Jagau v. Goetz (Com. Pl.)*, 32 N. Y. Supp. 144; *Smalley v. Mitchell (Mich.)*, 68 N. W. Rep. 978.

⁸ *Wilkinson v. Heavenrich (Mich.)*, 26 N. W. Rep. 139.

⁹ *Wolke v. Fleming (Ind.)*, 2 N. E. Rep. 325; *Henry v. Wells (Ark.)*, 3 S. W. Rep. 637.

¹⁰ *Warner v. Texas & P. Ry. (C. C. A.)*, 54 Fed. Rep. 922.

* See also Sec. 201, *infra*.

106. Contracts for an Interest in Lands.—The statutes usually require that any contract for the sale or transfer of lands, tenements, or hereditaments, or any interest in or concerning them, shall be in writing, or that a sufficient memorandum shall be made in writing.

This section has been held to apply to private sales, auction sales by administrators, executors, trustees, commissioners, and public officers, except judicial sales, and to exchanges of land. The statute applies to every agreement in regard to the title of lands, for the sale of equitable title as well as the legal title, and in short to every agreement by which an interest in land is modified, increased, or diminished, even to agreements for the possession of lands;¹ to agreements in regard to the use of a party wall;² for the sale of bricks of a ruined house still standing on the land,³ or to prepare the plans of a building and to superintend the construction thereof, in consideration of the conveyance of a certain lot.⁴

Whether a sale of growing timber or crops is an interest in lands is held differently in different states. It is usually determined by the evident intention of the parties, if that can be gathered from the evidence, whether the sale is a sale of chattels made by cutting the growing timber or crops, or whether the buyer is to derive any benefit from the lands. In some states it must be in writing if it is a natural growth, *i. e.*, not requiring cultivation as timber; while if it is for a crop that has been planted and cultivated like growing grain, potatoes, and root crops, then an oral contract will suffice.⁵ A good general rule is that the agreement does not fall within the statute unless some interest in lands in the nature of a title, enforceable either in a court of law or equity, is sought to be obtained, created, or transferred to the party furnishing the consideration.⁶ Therefore improvements upon lands, distinct from the title or possession, are not such an interest in the land as to bring agreements therefor within the statute. A parol promise to pay for work or labor upon land, whether already done or to be done, has never been held to be within the statute.⁷ An agreement to pay one-half the cost of a party wall located half on the land of two coterminous owners was held not within the statute of frauds.⁸

Agreements relating solely to the use to be made of lands are valid if not in writing. Such is an agreement not to use a building for a certain purpose, to keep up a fence, to remove a fence, or to use lands for the manufacture of bricks from clay found in it, the title of the property in the clay and wood to remain in the owner until paid for. An agreement not to

¹ 8 Amer. & Eng. Ency. Law 694-7.

² *Rice v. Roberts* 24 Wis. 461.

³ *Meyers v. Schemp*, 67 Ill. 469; *but see contra* 8 Amer. & Eng. Ency. Law 698.

⁴ *Koch v. Williams* (Wis.), 52 N. W. Rep. 257.

⁵ 8 Amer. & Eng. Ency. Law 698-700.

⁶ 8 Amer. & Eng. Ency. Law 701.

⁷ *Many cases cited in* 29 Amer. & Eng. Ency. Law 860; *Scales v. Wiley* (Vt.), 33 Atl. Rep. 771.

⁸ *Stuht v. Sweezy* (Neb.), 67 N. W. Rep. 748.

build within a certain number of feet from the street and an agreement to open a street have both been held to be within the statute;¹ but parol agreements between coterminous owners of lands fixing their boundaries, followed by possession, is valid and binding,² and an agreement to remove a fence has been held not within the statute.³ There are, however, decisions holding such oral agreements void.⁴ Usually the cases hold that the parties must occupy to the boundary for the full statutory period, which bars an action at law, though there are cases to the effect that possession for a shorter time will fix the boundary.⁵

The right to possession of land is such an interest in land as to require an agreement to deliver possession to be in writing.⁶

107. Special Agreements Relating to Lands.—Agreements releasing pecuniary claims for damages to lands where they have been flowed by a mill-pond,⁷ or have been taken for public purposes, need not be in writing, for they are held not within the statute.⁸

Agreements to refund or discount the price if the quantity of land falls short have been held valid if not in writing, but an agreement to pay an additional sum if coal was found has been held within the statute.⁹

Where land has been conveyed an oral promise to pay therefor at a certain rate is not within the statute of frauds, and the stipulated amount may be recovered in an action at law.¹⁰

108. Contract Implied by Law to Pay for Benefits Conferred when there has been Enrichment.—Under any of the provisions of the statute, if a contractor has, in reliance upon an oral agreement and in accordance with its terms, made improvements which are a benefit to the other party estate, he may recover their value if the other party refuse to perform his part of the agreement. The recovery is not upon the oral agreement, but upon the contract implied by law and imposed upon the owner by law that he shall not enrich himself at the expense of one whom he has victimized. An attempt to make an oral contract between the parties, or the existence of such an undertaking, does not prevent the law from imposing a contract upon the party who has profited by his own wrong.¹¹ The owner must have been enriched, for if the contract was entirely for the benefit of the contractor he cannot recover, and the profits he has received may be deducted from the value of the improvements.¹² *

¹ 8 Amer. & Eng. Ency. Law 703.

² Archer v. Helin (Miss.), 11 So. Rep. 3.

³ Storms v. Snyder, 10 Johns. 109; and see 44 Wis. 96, 60 Wis. 310, 500.

⁴ White v. Hopeman, 43 Mich. 267; Hagev v. Detweiler, 35 Pa. St. 409.

⁵ See *Adverse Possession*, 1 Amer. & Eng. Ency. Law 249-250.

⁶ Boyd v. Paul (Mo.), 28 S. W. Rep. 171.

⁷ Clement v. Durgin, 5 Greel. (Me.) 14;

* See Sec. 53, *supra*.

Smith v. Goulding, 6 Cush. (Mass.) 154.

⁸ 8 Amer. & Eng. Ency. Law 704.

⁹ Freed v. Richy (Pa.) 8 Atl. Rep. 626; Kickland v. Mensha W. W. Co. (Wis.), 31 N. W. Rep. 471; Huff v. Hall (Mich.), 23 N. W. Rep. 88; Camp v. Moreman (Ky.), 2 S. W. Rep. 179; Railroad Co. v. English, 16 Pac. Rep. 82 [1887].

¹⁰ 8 Amer. & Eng. Ency. Law 661.

¹¹ 8 Amer. & Eng. Ency. Law 662.

109. Contracts for the Creation, Assignment, and Surrender of Estates in Land.—By the statute of frauds all estates created or transferred must be in writing, and usually the law also requires that they shall be sealed and witnessed, and that they shall also be acknowledged and made of public record. Usually estates less than a freehold are not required to be acknowledged nor registered, but it is good practice nevertheless to have both ceremonies carried out, except perhaps in case of short leases. All such instruments should be signed by both parties. Bids at auction sales of house-lots or land, being verbal, are within the statute of frauds and not binding. Being voluntary, they are usually carried out, but cannot be enforced.¹ A parol promise by a grantor to warrant and defend the title to the land sold is void, being within the statute.²

The question often arises as to what is a lease, or such an estate in land as to require a written instrument, and upon that question there are decisions both ways. Without doubt all agreements for the permanent occupation of another's lands or any part thereof should be in writing. So it has been held that permission to erect upon the land of another a permanent structure, such as a building or a bridge, or leave to occupy with a railroad, a canal, a dam, or to overflow by a dam, to dig a drain or lay a pipe, to dig and carry away coal, ore, stone or dirt, or to haul logs across, amounts to a lease, since it is a grant of an interest in the land itself, and must be in writing. There are cases which hold to the contrary that where oral permission has been given to build a permanent structure upon lands, as a party-wall, a bridge, an aqueduct, a dam, etc., that although mere licenses are ordinarily revocable at any time, yet having been acted upon they are valid, binding, and irrevocable.³ The fact that there are such decisions affords no excuse for one to accept such a license and invest his money on the strength of it, if he can get a lease in writing, even by paying for it.

110. Promises to Answer for the Debts of Another.—The statute also requires all contracts or agreements to answer for the debt, default, or misdoing (miscarriage) of another party to be in writing, or some memorandum to be made in writing, and signed by the party to be charged. The provision varies slightly in the different states, but the law is generally that promises to pay other's debts or to be surety for their undertakings must be in writing. The statute includes every kind of liability that may be enforced in a civil action, but the promise must be to the creditor himself, and not to the debtor—i. e., the one who is himself liable, the latter promise is not within the statute of frauds. A promise by the debtor himself to pay is not within the statute, even though another is also liable, and even though one debtor promises to pay if the other debtor does not pay. Therefore the promise of

¹ *Boyd v. Greene* (Mass.), 39 N. E. Rep. 277; and see *Lobit v. McClave* (Tex.), 28 S. W. Rep. 726.

² *Kelly v. Palmer* (Neb.), 60 N. W. Rep. 924.

³ 8 Amer. & Eng. Ency. Law 667.

a partner to pay a firm debt is not within the statute, while a stockholder's promise to pay a corporation debt is within the statute.

The promise must be to pay with his own funds, and not out of the funds of the debtor that are in his possession, and a debt, it seems, is not funds or property in this sense. The promise must be for a good consideration.

111. Application of the Law to Construction Work.—In construction contracts, cases often arise where the contractor has failed to pay his men or is unable to get materials to go on with his work, and the owner or person to be benefited by the performance of the contract has promised to pay for the labor and materials if the workmen and materialmen will continue at work and to supply the necessary materials of construction. When the owner makes such promises it is important to ascertain whether he himself undertakes to assume the obligation or whether he insures the payment of the contractor's debt. If the owner seeks to obtain a direct benefit or advantage to himself, as to relieve his property from a lien, it is generally held an original obligation, and therefore not within the statute.¹ If it be the evident intention to insure the payment of a debt of another, then it is within the statute, and must be in writing. Some courts have based their decisions upon the fact whether there was a new and distinct consideration for the promise, and if it inured directly to the benefit of the promisor, in which case it was not within the statute; while other courts have ignored these facts, as well as the parties' intentions, and called it a collateral obligation if the original party (contractor) remained liable, making the promise within the statute unless the agreement was a substitute for the original liability.

There are many cases on both sides,² but there is a safe and sure way for the owner or his engineer, which is to make such agreements in writing, and to make it clear whether the undertaking is to cancel the obligation of the contractor and to substitute the owner, or whether the original obligation is to continue and the owner become a surety for its performance.

Some cases will illustrate the law. Thus when a contractor having an apparent purpose to quit unless payment was made or assured was told by a third party to go on with the work and he would see that he got his pay it was held that as to the work already performed the promise, not being founded on any consideration, was a collateral undertaking to pay the debt of another, which, not being in writing, was void.³ The same decision was reached when a third party told the contractor to go on and finish his work and he himself would pay for it.⁴ In another case an oral agreement by the owner to pay a subcontractor, on the abandonment of the contract by the

¹ *Seguine v. Spaeth* (Com. Pl.), 35 N. Y. Supp. 847.

² 8 Amer. & Eng. Ency. Law 682.

³ *Gable v. Graybill*, 1 Pa. Super. Ct. Rep.

29; *Warwick v. Grasholtz*, 3 Grant 234.

⁴ *Gill v. Herreck*, 111 Mass. 501 [1873]; *Lachman v. Irish* (Sup.), 25 N. Y. Supp. 193.

original contractor, an amount already due him from the latter and an additional sum for extras if he would complete the work, is not void as being a promise to answer for the debt of the contractor.¹ An interesting case is reported where an owner had written to a subcontractor as follows: "By direction of the contractor and at the request of C. I hereby hold \$2700, which I hereby agree to pay you when the work has been delivered and put in proper and workmanlike manner; \$2500 of which is to be charged on my contract with the contractor on account of his contract with C., and \$200 on account of his contract with me, for your labor in putting said work in said place." It was held a guaranty to pay the debt of C., and not an original obligation by the owner.²

When a contract provided that if the contractors failed to furnish material the owner would supply the material and deduct the cost from the price, and a materialman, after furnishing certain material on the contractor's credit, refused to furnish more, and an arrangement was made whereby, on the contractor's written order to the owner, the architect was to make the estimates and payments directly to the dealer, it was held that the agreement was not within the statute of frauds, as it was not a promise to pay plaintiff's debt, but to benefit defendant by the immediate acquisition of materials for the building.³

A subsequent promise by an owner to a materialman to see that materials furnished in the construction of the owner's house upon the credit of the contractor were paid for is not enforceable, and it will not support a personal judgment against the owner. Such a promise was held a mere verbal collateral contract.⁴

If a contractor, not being paid by an owner, has abandoned the contract and afterwards resumed it, and did certain extra work on the verbal promise of a third party to pay him, but the evidence showed that he still looked to the owner for his pay, and not to a third party except as guarantor, the promise of the third party, not being in writing, is void both as to the extra work and that done under the contract.⁵

A verbal agreement on the part of a supply company to furnish a subcontractor materials for his subcontract, the bills when O.K.'d to be paid by the contractor, is an original agreement on the part of the supply-men, and not an agreement to pay the debt of the subcontractor.⁶ It has been held, however, that a promise by a contractor to his subcontractor's men if they will continue at work is an original undertaking on a sufficient consideration which need not be in writing.⁷ Promises by a husband

¹ *McLaughlin v. Austin* (Mich.), 62 N. W. Rep. 719; *Andree v. Bowman*, 13 Md. 241.

² *Blerschenk v. Stokes*, 26 N. Y. Supp. 88; and see *Emerson v. Slater*, 22 How. 28.

³ *Bice v. Marquette, etc., Co.* (Mich.), 55 N. W. Rep. 382; *Calkins v. Chandler*, 36 Mich. 324, *followed*.

⁴ *Farnham v. Davis* (Me.), 9 Atl. Rep. 725 [1887].

⁵ *Brester v. Pendell*, 12 Mich. 231 [1864].

⁶ *Barras v. Pomeroy Coal Co.* (Neb.), 51 N. W. Rep. 890.

⁷ *Suell v. Rogers* (Sup.), 24 N. Y. Supp. 379.

for the wife's individual debt, or by the wife for the husband's debt, have been held to be within the statute, and void if not in writing.¹

In an action by a materialman against a contractor for lumber furnished for a house it is no defense that the owner assumed the debt unless there was a novation which released defendant.²

The statutes usually require all contracts in consideration of marriage to be in writing, or that there be a written memorandum of the terms of the agreement signed by the party or his authorized agent. Such contracts are marriage settlements or any agreement which makes the marriage the consideration. It does not include mutual promises to marry.³

STATUTE OF LIMITATIONS.

112. Objects and Reasons for the Statute.—The time within or the period in which the obligation of a contract can be enforced, or within which an action or suit can be brought for a breach of a contract, is limited in the United States, England, and Canada by certain statutes of limitations. The object of these statutes is to require people to enforce their rights within a reasonable time or to abandon them. They are calculated to give security and repose to business, and to relieve the parties from the necessity of preserving indefinitely their receipts and other evidence of settlement. It provides against the evils that arise from loss of evidence and the failing memory of witnesses, and relieves the defendant from the burden of keeping track of witnesses and preserving documentary evidence in the constant apprehension of being called upon to defend himself in an action at law, while the claimant is required to employ reasonable diligence in prosecuting his claims. The statutes may prove an obstacle to just claims, as where a party may not be able to pay during the period, but afterwards becomes affluent, or where it is within the power of the defendant to avoid and evade a suit during the statutory period.⁴

The statute had its inception in the convenient rule made by courts that after twenty years a presumption arose that debts and even bonds had been paid or released unless the delay was explained by the creditor and he showed that they had not been paid. In fact, independently of any statute of limitation, courts of equity have inherent powers to refuse relief after undue and unexplained delay, and when injustice would be done by granting the relief asked, and the doctrine applies to suits relating to land.⁵

113. Statute Does Not Destroy the Contract Obligation, but Affects the Remedy or Means of Enforcing It.—The statute does not and cannot affect

¹ *Brennan v. Chapin*, 19 N. Y. Supp. 237; *Perkins v. Westcoat* (Colo.), 33 Pac. Rep. 139.

² *Aldritt v. Panton* (Mont.), 42 Pac. Rep. 707.

³ 8 Amer. & Eng. Ency. Law 684; *Short v. Statts*, 58 Ind. 29 [1877].

⁴ 13 Amer. & Eng. Ency. Law 736.

⁵ *Abraham v. Ordway*, 15 Sup. Ct. Rep. 894.

the contract obligation, it is no part of the contract, but it denies the claimant a means of enforcing his right in a court of law after he has delayed a certain number of years to enforce it. It affects the action only, and not a defense. Thus a defendant may show that a contract was procured by fraud, though the statutory period has passed. A counter-claim or cross-complaint is not a defense in this sense. The statute has only to do with the remedy for a breach of the contract, for without a breach there is no action on a contract. When the statutory period has elapsed no action can be brought in a court of law, and courts of equity decline to entertain suits when an action at law is barred unless there are circumstances showing fraud or oppression.

Much difference of opinion has been expressed as to whether the statute affects the *right* of the claimant so that if the statutory period be changed (extended) it restores the claimant's right to sue. Whether or not this be so, it is well settled that the statute does not destroy the obligation, and that it affects only the remedy, and not the merits of the claim.¹

114. Disabilities that May Prevent the Operation of the Statute—Personal Disabilities.—Since the defense of the statute is given on the presumption that the claimant has been guilty of laches, it follows that if no delay can be imputed to the claimant, then the statute ought not to apply. If the ability to bring an action has been taken away from the claimant, or he has been disabled from bringing an action of law, *i. e.*, if he (she) were in infancy, insane, idiotic, or under coverture, except where women have the right to sue and be sued, or his (her) residence was in a foreign country or state, such disability must have existed when the right of action accrued, for if the statute had commenced to run no subsequent disability would interrupt it. If a contractor dies even a day after his cause of action accrued, that day was sufficient to set the statute in motion, and if an infant heir were left the infant cannot plead his disability, though there was no time during the whole period when he was of age and able to bring an action. This may seem unjust, but the rule seems a necessary rule to insure the security and repose for which the statute was created. For the same reason one disability cannot be tacked or added to a previous disability partly or entirely run out.

Therefore if a woman is an infant when her right of action accrues, and before she becomes of age she marries, becomes insane before her husband dies, and then dies leaving infant children, only the first disability of infancy will prevent the statute from setting in, and it will bar the statute only so long as the woman was an infant. Such a case shows how the very object of the statute might be subverted if such a rule were not maintained. Several generations might live under disabilities in families in which early marriages, insanity, and short lives were hereditary.

¹ 13 Amer. & Eng. Ency. Law 693-704.

If the action accrue when the party is under more than one coexisting disability, the statute will not be set in motion until they are all removed. Therefore if, when the right to an action accrues, a woman be married, under twenty-one years of age, and insane, and her husband died at thirty and she became sane at forty, the statutory period would not begin to run until she were forty.

So long as there is nobody against whom the claimant can bring an action the statute of limitations does not run. Such cases arise when the administrators of the defendant have not been appointed, though it does not exclude the time between the death of the claimant and his administrator.

115. The Letter of the Law is Applied Strictly, without Regard to Hardship or Misfortune.—The statute does not run against a town until it is incorporated and has capacity to sue. There are exceptions, however, to this rule in California¹ and Georgia. The statutes of many states contain special provision for such cases, which statutes should be consulted. There has been a doctrine, which is no longer accepted, that an inherent equity would create an exception to the rule, but the general law now is that the language of the act must prevail, and no reason, based on apparent inconvenience or hardships, can justify a departure from it.² This is illustrated by a remarkable case in which a city eluded the service of summons during the whole period of ten years, the statutory period. Each year, as soon as the officers of the city were elected, they met and transacted what business was necessary, in a secret place, with doors locked and sentries posted, after which they filed their resignations, which by law took effect immediately, leaving no officer of the city upon whom the railroad company, who held the city's bonds, could serve summons. The court held that however dishonest and wrong morally it was for a debtor to evade services of process, it was not fraudulent in a legal sense, and that as it did not come within any express exception of the statute, the court could not make it one, as that would be making a law instead of administering it, the former of which is for the legislature, the latter for the courts.³

War is such a disability or condition as will prevent the statute from operating. It must affect the parties or be of such duration and character as to close the courts. War will not only prevent the statute from taking effect, but it will interrupt the running of the statute for the term that the war existed.

116. Statute Does Not Operate against the Government.—The state nor the United States are not barred unless it is so expressly provided in the statute.⁴ The business of the government being transmitted entirely through agents, who are so numerous and scattered, the utmost vigilance would not protect

¹ 13 Amer. & Eng. Ency. Law 737.

² 13 Amer. & Eng. Ency. Law 735.

³ Amy. v. Watertown (Wis.), 22 Fed. Rep. 418.

⁴ Slantey v. Schwalby (Tex.), 19 S. W. Rep. 264 [1892]; Jefferson City v. Whipple, 71 Mo. 519 [1880].

the public from losses and combinations to defraud the government. The government is, therefore, exempt from the operation of the statute upon the grounds of public policy, and not upon the notion of extraordinary prerogative. This exemption is accorded to the different branches of the government only when they act in the sovereign capacity. If the government engages in purely business transactions, as in banking, it is held to be divested of its sovereignty, and to no longer be exempted from the statute.¹

Rights of a public nature cannot be lost from the lapse of time, but when the rights involve a mere claim of dollars and cents and involve no question of governmental right or duty, the courts hold the government to the ordinary rules controlling courts of equity. In general, in ordinary business transactions, cities, towns, counties, and school districts are within the statute of limitations as much as the individuals with whom they do business.² Trespass, nuisances, and other encroachments upon public property cannot be supported by possession and enjoyment for any length of time, for public rights cannot be lost by adverse possession, unless the statute has expressly included the government.

Though the government is not required to plead the statute when plaintiff to a suit, it can plead the statute against its subjects when sued by them, and it seems its representative officers have no power to waive the statute.³ The defense of limitations must be raised in the trial court; it cannot be raised for the first time on appeal.⁴

117. Agreements to Waive the Protection of the Statute.—Agreements to waive the statute of limitations or to not plead it in certain actions, even though founded upon a good consideration, have been held void as against public policy. Such agreements may amount to a new promise to pay a claim and take the claim out of the statute as to the length of time already transpired, but not as to the future.⁵

The bringing of a suit by the claimant stops the statute running, and the rule is pretty well settled that the day on which the action accrues is excluded in computing the statutory period. In some states the action is begun by the actual service or by the delivering of summons to the sheriff.

118. New Promises May Interrupt the Running of Statute and Forfeit Its Protection.—A contractor or party to a contract, express or implied, may have lost the protection that the statute would have afforded him by making new promises, acknowledging the debt, or part payments upon a long standing account or contract. An express promise to pay a debt, or acts or words from which the law can imply a promise will make a new cause of action

¹ See *United States v. North Amer. C. Co.* (C. C.), 74 Fed. Rep. 145.

² 13 Amer. & Eng. Ency. Law 715.

³ 13 Amer. & Eng. Ency. Law 716.

⁴ *Shaver v. Sharp Co.* (Ark.), 34 S. W.

Rep. 261.

⁵ *Elsman v. Heine* (Sup.), 37 N. Y. Supp. 861; *Pickett v. Edwards* (Tex.), 25 S. W. Rep. 32.

⁶ 13 Amer. & Eng. Ency. Law 717.

which can be sued upon any time within the full statutory period; it starts the statute anew from the date of the express or implied promise. Any acknowledgment of the debt, such as part payment, unless accompanied by declarations or circumstances which clearly indicate that the act is not an acknowledgment of the debt or claim, will be sufficient for the law to imply a new promise to pay.

Part payment of the principal, payment of interest, or an acknowledgment indorsed upon a note is usually sufficient to start the statute afresh, but the payments must be voluntary, so that a promise may be implied. If the promise is "to pay as soon as I can" or on the happening of a certain event, then it must be shown that the promisor has since been able to pay or that the event has transpired. The acknowledgment must specify the amount of the debt and the debt referred to if it cannot be in some manner connected with the debt or account to which it relates. It is sufficient if the amount can be computed. An acknowledgment that one owes another for services has been held sufficient, and the wages may not have been agreed upon. Usually the acknowledgment must be in writing by the debtor or his authorized agent, and must be communicated to the creditor or his agent.¹

119. Injury Concealed by Fraud, so that Right of Action was Not Known.—Cases frequently arise in construction-work where the cause of action is not discovered at the time it accrues, as where inferior work or poor materials have been used and their use concealed from the owner, and have not been discovered for some years thereafter. It is an established rule in courts of equity that fraudulent concealment of the cause of action on the part of the contractor will deny him the protection of the statute of limitations so long as the owner remains ignorant of his rights or the injury he has suffered. However, this is no special rule, for it is a general practice for courts of equity to give relief to one on whom fraud has been practiced. Courts of law have sometimes followed the rule, though not universally, and it has been generally applied in courts having concurrent jurisdiction of both law and equity cases.²

When fraudulent practice has been concealed, the time will not begin to run in favor of the perpetrator of the fraud until the fraud has been discovered, or until it might have been discovered if reasonable diligence had been exercised.³ The party defrauded must be diligent, and a clue to facts which if followed up diligently would have led to a discovery has been held equivalent to a discovery.⁴ The recording of a deed has been held sufficient notice, so that there should have been a discovery.⁵

¹ 13 Amer. & Eng. Ency. Law 748 *et seq.*

² Leake's Digest of Law of Contracts 977; Troup v. Smith, 20 Johns. (N. Y.) 33; 13 Amer. & Eng. Ency. Law 728.

³ Kirby v. Lake Shore, etc., R., 120 U. S. 130; Amy v. Watertown, 120 U. S. 320.

⁴ Norris v. Haggin, 28 Fed. Rep. 275, and cases cited.

⁵ Beattie v. Pool, 13 S. Car. 383; *but see* Herndon v. Lewis (Tenn.), 36 S. W. Rep. 953.

The fact that the contractor has made no special effort to conceal the fraud does not give him the protection of the statute in a court of equity,¹ but at law the fraud must have been committed by affirmative acts. Concealment without fraud, it seems, is not sufficient to toll the statute, nor is fraud without concealment.

In some states the statute is tolled, *i.e.*, inoperative, only in such actions for relief on the ground of fraud as were originally recognized in equity, while in other states and in England the statute is made to run only from the time the fraud was discovered or might have been discovered with reasonable diligence. Each case must be decided by the law of the state by which it is governed. It is sufficient for the purpose of this work to give a general idea of the law, so that engineers, architects, and contractors may avoid difficulty and litigation.

120. Bad Work Concealed When under Inspection and Supervision of Engineer.—How far the inspection and supervision of work by the owner's architect or engineer would excuse the contractor from the charge of fraudulent concealment would be a matter of fact in each case. If there was no express act on the part of the contractor to conceal bad work, no deception practiced upon the inspectors, such as enticing them away, or working secretly at hours when the work was supposed to be idle, or of bribing them to pass imperfect work, it may well be doubted if poor work not in accordance with the contract would be called fraudulent, or that it could be said to be concealed. This would be especially true when the fact of an inspector's being appointed and every clause of the contract shows that it was feared, if not expected, that the contractor would take advantage of every opportunity to slight the work and effect every saving possible to himself.

Collusion between the contractor and engineer or architect by which the latter was to pass work or materials which it was his duty to reject or report to his employer would without doubt amount to a fraud which would give relief in equity to the owner or proprietor. A failure on the part of one holding fiduciary relations or relations of confidence and trust to report what it was his peculiar duty to disclose has been held a fraudulent concealment.^{2*} It has been held that fraudulent concealment by an agent of the amount collected for his employer prevented the running of the statute.³ A petition based on fraud which was practiced more than the statutory period before the beginning of the suit should allege that the fraud was discovered within the period of limitations.⁴

121. Liability of Engineer for Misconduct after Statutory Period has Elapsed.—It seems that an engineer or architect or attorney cannot be prosecuted for misconduct, negligence, or mistake in designing, examining,

¹ 13 Amer. & Eng. Ency. Law 683.

Rep. 197.

² 13 Amer. & Eng. Ency. Law 729.

⁴ McCalla v. Daugherty (Kan. App.), 46

³ Bonner v. McCreary (Tex.), 35 S. W.

Pac. Rep. 30.

* See Sec. 249a, *infra*.

or inspecting work or drafting papers, etc., after the statutory limit (usually six years) from the time the act or negligence was committed, although it was *not* known to the employer and was *not* discovered by him until the period of limitation had elapsed. It has been held, therefore, that one who has been employed to examine titles or securities and has done so in a negligent manner, whereby money loaned upon it has been lost, the right of action dates from the negligence or misconduct.¹ The cause of action accrues the moment the employee fails to do what he agreed to do.

In some states the time is limited by statute in which a person may bring his action after he has discovered the fraudulent concealment. In Alabama only one year is given, in Michigan and Kansas two years, and in Colorado three years. In Missouri the discovery must be made within ten years, and in Kentucky the action must be brought in ten years or it is barred, whether the fraud be discovered or not.

An action for breach of a contract will lie at once on a positive refusal to perform, though the time specified for performance has not arrived.²

When extra work or extra expense is required to carry out changes in the plans of work done under a contract, the period of limitations does not begin to run while the contract is executory.³

LAW OF CONTRACTS. PROOF OF TERMS OF COLLATERAL CONTRACT.
PAROL OR VERBAL AGREEMENTS.

122. Parol Evidence Not Admissible to Vary or Contradict a Written Contract.—Parol evidence of what was said or done before or at the time of making a written contract is not admissible to alter, vary, or contradict the express terms of that contract. The proposition is of too long standing and is too well recognized as one of the foundation principles of the law to be questioned.⁴

It is a general rule of law that when parties have deliberately put their engagements in writing in such terms as import a legal obligation, without any uncertainty as to the object or the extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking were reduced to writing.⁵ In such case to add to it by implication would be to vary its terms and legal effect.⁶

¹ Leake's Digest of Contracts 977; Short v. McCarthy, 3 B. & Ald 626; Brown v. Howard, 2 B. & B. 73; Howell v. Young, 5 B. & C. 259; Wilcox v. Plummer, 4 Pet. 172; Argall v. Bryant, 1 Sandf. 99; Rankin v. Shaeffer, 4 Mo. App. 108.

² Donovan v. Sheridan (Super. N. Y.), 24 N. Y. S. 116.

³ Gibbons v. United States, 15 Ct. of Cl. 174 [1879]; and see Wilkinson v. Johnston (Tex.), 18 S. W. Rep. 746; O'Brien v. Sexton (Ill.), 30 N. E. Rep. 461 [1892]; and Knight v. Knight (Ind.), 30 N. E. Rep. 421 [1892].

As to responsibility when injury results from an undiscovered defect in the engineering works, see Underhill on Torts 17.

⁴ Bishop on Contracts 175, 355, 58, and cases cited; 17 Amer. & Eng. Ency. Law 420.

⁵ McKinley v. Williams (C. C. A.), 74 Fed. Rep. 94.

⁶ Merchants' Ins. Co. v. Morrison, 62 Ill. 242 [1871]; see also 69 Ill. 226, 13 Ill. A. p. 503.

This presumption may be overcome if the parol evidence be admitted without

All conversations and agreements had or made and tending to vary or contradict the provisions of the written contract are inadmissible as evidence to show the meaning or intention of the parties. The written contract must be taken to express the final intention and understanding of the parties. Whether the evidence offered be conversations, correspondence,¹ or previous oral understandings with regard to the same subject-matter, it is not admissible if the contract be clear and certain in its terms.²

If there is any one thing that should be impressed upon the minds of engineers, architects, contractors, and builders alike, as well as upon the minds of owners, officers, and managers, it is the fact that a written contract should be complete. It should contain every term and provision, stipulation and condition that the parties are agreed upon. It should embody every item of prior and contemporaneous agreements that they intend shall be the basis of the contract. It should not only provide for present and existing conditions, but should anticipate every difficulty and controversy that may arise in the execution of the contract or the prosecution of the work. When the contract is made and entered into is the time to insist that all the terms agreed upon shall be incorporated in the written instrument; and for either party to take the word of the other that "this or that is understood," or to be satisfied with the assurance that "we will make that all right," is to sacrifice so much of the consideration.

Every man is presumed to know the effect of a contract which he signs, and he can have no action against the other party for misrepresentations made to him as to its illegal effect; nor will such misrepresentations invalidate the contract.³ When there is evidence that the contractor read the contract sued on, he cannot be heard to say that he was misinformed by the other parties as to its legal effect.⁴

If the intention of the parties be clear the court will not look beyond the four corners of the paper for the entire contract, nor will it listen to any testimony as to prior conversations, understandings, correspondence, or promises without there is an independent consideration to support them. It was therefore held that where a contract was silent as to the time of performance of a contract, evidence of a contemporaneous agreement as to when it was to be done could not be received to vary the ordinary legal construction that it was to be performed in a reasonable time.⁵ So when a contract has been signed for the insertion of an advertisement in a paper for one

objection. *Brady v. Nally* (N. Y. App.), 45 N. E. Rep. 547.

¹ *Eaton v. Gladwell* (Mich.), 66 N. W. Rep. 593.

² *Bryan v. Idaho Quartz Min. Co.* (Cal.), 14 Pac. Rep. 859; *Wonderly v. Holmes Lumber Co.*, 56 Mich. 413 [1885]; *Curtiss v. Waterloo*, 38 Iowa 266 [1874].

³ 8 Amer. & Eng. Ency. Law 636. Nor are false representations as to the validity

of a patent actionable, 8 Amer. & Eng. Ency. Law 636, if the person to whom they are made has the same means of information.

⁴ *Kingman & Co. v. Shawley*, 1 Mo. App. Rep'r 281.

⁵ *Liljengren Fur., etc., Co. v. Mead* (Minn.), 44 N. W. Rep. 306; *Boehm v. Lies*, 18 N. Y. Supp. 577.

year at a price named, payable quarterly, it cannot be shown that there was an understanding at the same time that the advertisement could be stopped at any time if it did not suit,¹ or that it was agreed at the time of signing the contract that the advertisement and cut should be submitted to defendant for his approval.² When a contractor has taken work to be completed by a certain time or to be delivered at a certain place, he cannot prove that the completion of the work was to depend on the delivery of certain materials, or on the navigability of certain streams,³ or that the defendant railroad company was to haul the materials,⁴ or that the contract price was one suitable for a rough job only,⁵ or that the owner and his engineer had agreed, before the contract was executed, as to the quality of materials and as to a standard for comparison.⁶

The rule against admitting parol evidence to alter or contradict a written contract applies to the signature of the parties as well as to the body of the contract.⁷

123. When Parol Evidence will be Received.—Parol evidence of a contract is admissible under the following circumstances: 1. To show that there is not and never was a legal contract. This will admit evidence to show that the contract lacked any of the essential elements of a lawful contract, the incapacity of the parties, a want or a failure of the consideration, or that the consideration was illegal or immoral, or that its object or purpose was illegal or against the policy of the law, that the mutual understanding of the parties was not correctly expressed, or that it was not executed or acknowledged as required by law, or was not delivered, or was delivered in escrow or subject to a condition, or that it was obtained by duress, menace, fraud, or collusion, which, as is well known, vitiates all acts, however solemn.⁸ 2. To show that the contract, though absolute on its face, was and is subject to a condition precedent to its performance. Such evidence must prove the existence of a separate parol agreement that the obligation should not attach until the condition precedent was performed or the event had transpired.⁹ 3. To explain the meaning of technical words and expressions, and to prove the existence of certain customs and usages. In construction work such technical words and phrases are those used in the trades, or by engineers and architects in the practice of their profession; and the customs and usages are those which have grown up in the business, and may consist of certain rules by which

¹ *Cohen v. Jockoboice* (Mich.), 59 N. W. Rep. 665.

² *Coleman v. Rung*, 31 N. Y. Supp. 456.

³ *McNeeley v. McWilliams*, 13 Ont. App. 324 [1887].

⁴ *Scott v. Norfolk & W. R. Co.* (Va.), 17 S. E. Rep. 882.

⁵ *Crow v. Becker*, 5 Robt. (N. Y.) 262.

⁶ *Jones v. Risley* (Tex.), 32 S. W. Rep. 1027; *Eaton v. Gladwell* (Mich.), 66 N. W.

Rep. 598. *Other cases see* *Monroe v. Perkins*, 9 Pick. 298; *Rand v. Mather*, 11 Cush. 1; 59 Am. Dec. 131.

⁷ *Belwinkle v. Cramer*, 3 S. E. Rep. 776 [1887].

⁸ *Byersted v. Winona Mill Co.* (Minn.), 51 N. W. Rep. 619 [1892]; 17 Amer. & Eng. Ency. Law 438; *Best's Chamberlayne's Principles of Evidence* 235.

⁹ 17 Amer. & Eng. Ency. Law 436.

measurements are made and work is estimated.¹ It is well established that parol evidence will *not* be received of a usage which is repugnant to the express terms of the contract,² though there are cases in which "black" has been shown to mean "white," and in which "one" has been shown to mean "two or more." * 4. It may be shown by parol evidence in what character the parties contracted—that one or both were acting in the capacity of an agent, officer, trustee, or administrator. 5. Parol evidence may be received of a prior agreement based upon a sufficient consideration as a defense to a suit for specific performance.³

It is the duty of a court to make an agreement effective if possible, and oral evidence will be received to identify, describe, or explain a contract.⁴ If it is incomplete, oral evidence will be admitted to supply matter omitted from the writing where it is apparent from the writing itself that something has been left out. So when a deed conveys "all my real estate" without any other description, evidence will be received to locate the premises,⁵ and to show that the parties of a written lease of "four acres out of lot four" had agreed on certain boundaries thereof.⁶

The facts existing at the time the contract was made, and of the circumstances of the parties, and of the building, may be shown when the question is as to whether a building was to be a two or a three story structure, no plans having been drawn or prepared.⁷ Oral evidence has been admitted to show quantities, and to show that certain plans and specifications not referred to in the contract were submitted to the contractor for his estimate of cost, and that such plans and specifications were modified by subsequent parol agreement.⁸ Oral evidence is admissible to identify a prior contract incorporated into, or specifications referred to, in a contract to erect a structure, and when identified they may be considered in connection with the contract to determine whether or no the contract is void for uncertainty.

If the contract and specifications appear inconsistent, such variance may be explained by oral testimony. If the papers when taken together show clearly that the specifications are incomplete, evidence may be admitted to explain them or to supply the parts omitted.⁹

If a contract to rebuild a wall fails to show how much of the old wall is to be taken down, it may be shown by parol evidence what was contem-

¹ *Ford v. Beech*, L. R. 11 Q. B. 866.

² *Myers v. Sarl*, 30 L. J. Q. B. 9; *Mallan v. May*, 13 M. & W. 517.

³ See 13 *Solicitors' Journal & Rep.*, pp. 312, 336, 353, and 373.

⁴ *Coleman v. Man. Imp. Co.*, 94 N. Y. 279; *Howard v. Pepper*, 136 Mass. 28; *Bennett v. Pierce*, 28 Conn. 315; *Hildebrand v. Fogle*, 20 Ohio 147.

⁵ 2 *Parsons on Contracts* 549, 21 Wend. 652, 13 Peters 89; see also *Primey v. Thompson*, 3 Ia. 74; *McKinzie v. Staf-*

ford (Tex.), 27 S. W. Rep. 790.

⁶ *Schneider v. Patterson (Neb.)*, 57 N. W. Rep. 398; *Trinley v. McDowell*, 24 S. W. Rep. 928.

⁷ *Doane College v. Lanham (Neb.)*, 42 N. W. Rep. 405 [1889].

⁸ *Isaacs v. Smith*, 55 N. Y. Super. Ct. 446 [1888].

⁹ *Bergin v. Williams*, 138 Mass. 544; *Comer v. Comer (Ill.)*, 11 N. E. Rep. 848 [1887].

¹⁰ 17 *Amer. & Eng. Ency. Law* 442-3.

plated by the parties;¹ also, that stone from a certain quarry were to be used;² as to how payments should be made and the place and time of delivery;³ as to the meaning of the clause "the entire walls of the building inside and outside are to be painted" when it is claimed and denied that the plastering as well as woodwork is to be painted;⁴ to determine how many cubic feet (16 or 25) constitute a perch of stone in a contract. In the absence of a statute defining a perch, it may be shown that it was verbally agreed at the time of the negotiations that the work was to be performed at 18 cents per cubic foot and that the party who wrote the contract reduced it to \$4.50 per perch of 25 feet; such evidence was held not to vary the contract, but to enable the court to interpret it in the sense intended by the parties.⁵

Likewise, oral evidence has been admitted to show what was intended by the words "at the price of two dollars per thousand;"⁶ "hewn timber to average 120 ft. and to class B, No. 1 Good"; "at a price per mile of road whether or not the side tracks were to be measured as road";⁷ "to make up the track in good running order, well surfaced, ties evenly and firmly bedded, etc."—whether or no this required the contractor to fill in the space between the ties with earth or other proper substance.⁸

In general, parol evidence is admissible to show a different or some other consideration than that named in the written contract if it be consistent with that which is expressed and does not defeat the legal operation of the instrument.⁹ When the consideration named in a deed is money, it may be shown that the consideration was in fact land of the value named, or that it was marriage,¹⁰ or a promise to do something.¹¹ Parol evidence has been held admissible to show in what manner the consideration was to be paid, and to show a distinct and collateral agreement which is not a part of the contract embraced in writing.¹²

In every case it should be held in mind that the parol evidence must not be inconsistent with the written terms of the contract. It cannot alter, vary, add to, nor contradict the written contract. The evidence must not change the intention of the parties as expressed in the written instrument, but it may complete it or explain it.

124. Parol Evidence to Explain Obscure and Ambiguous Contracts.—Contracts obscure or ambiguous may be made clear and the intention of

¹ *Donlin v. Daeglin*, 80 Ill. 608 [1875].

² *Centenary Church v. Cline* (Pa.), 9 Atl. Rep. 163 [1887].

³ 17 Amer. & Eng. Ency. Law 436; *Duplanty v. Stokes* (Mich.), 61 N. W. Rep. 1015.

⁴ *Beason v. Kurz* (Wis.), 29 N. W. Rep. 230.

⁵ *Quarry Co. v. Clement*, 38 Ohio St. 587.

⁶ *Smith v. Aiken*, 75 Ala. 209.

⁷ *Barker v. Troy, etc., R. Co.*, 27 Vt. 766.

⁸ *Western Union R. Co. v. Smith*, 75 Ill. 496 [1874].

⁹ *Wood v. Moriarity* (R. I.), 9 Atl. Rep. 427, 17 Amer. & Eng. Ency. Law 438.

¹⁰ *Tolman v. Ward*, 86 Me. 303; *Miller v. McCay*, 50 Mo. 214.

¹¹ *Twomey v. Crowley*, 137 Mass. 184.

¹² *Note, Bolles v. Sach* (Minn.), 33 N. W. Rep. 862 [1887], *cases cited*.

the parties brought to light by oral evidence of the surrounding circumstances, the situation of the parties, the subject-matter, the acts, and even the conversation of the parties under it.¹

Whatever the nature of the writing, the object is to discover the intention of the parties as shown by the words they have used. To this end the court may put itself in the position of the parties and view the surrounding circumstances, to see how the terms of the contract apply to the subject-matter of the contract.² Therefore, under a contract for employment of an engineer which is not clear as to the length of the term of service, or the salary to be received, or the kind of work to be undertaken, oral evidence is admissible to show the situation of the parties at the time the contract was entered into, the surrounding circumstances—what position the employee gave up to accept the employment, what duties his predecessor had been required to perform, etc.³

Evidence of the acts, conduct, and declarations of the parties may be given to show their understanding and practical interpretation of contract when the language used by them is indefinite and obscure.⁴ Evidence of such subsequent statements and conduct are only competent to show the parties' understanding of it, and do not change its express terms.⁵ The conduct has no doubt a great, if not controlling, weight in the interpretation of a contract,⁶ but the statements and declarations of the parties are often excluded altogether, whether made before, at the time of, or after the execution of the contract.⁷ Where a telegram and subsequent letters are a part of the negotiations which led up to a contract for the purchase of goods, they are to be construed together in determining the terms of sale.⁸

125. Parties may be Held to the Construction they have Themselves Adopted.—Evidence may be received of the construction put upon previous contracts of the same general character by the parties by their actions;⁹ and a subsequent contract with regard to the same subject-matter is admissible to show how the parties understood the earlier contract.¹⁰ The construction of a contract adopted by parties will prevail.¹¹ A promise of

¹ Caperton's Adm'rs v. Caperton's Heirs (W. Va.), 15 S. E. Rep. 257.

² Shrewsbury v. Tufts (W. Va.), 23 S. E. Rep. 692.

³ Excelsior Needle Co. v. Smith, 61 Conn. 56 [1892]; Marion School Tp. v. Carpenter (Ind.), 39 N. E. Rep. 878; Rogers v. Straub, 26 N. Y. Supp. 1066; Rhodes v. Cleveland Roll. Mill Co., 17 Fed. Rep. 406.

⁴ 11 Amer. & Eng. Ency. Law 578; Davis v. Shafer (Cir. Ct.), 50 Fed. Rep. 764; Engel v. Scott & Co. (Minn.), 61 N. W. Rep. 825; Leavers v. Clearly, 75 Ill. 349 [1874]; Lyon v. Motley, 30 N. Y. Supp. 218.

⁵ Potter v. Phoenix Ins. Co. (C. C.), 63 Fed. Rep. 382. It is admissible only when

there is ambiguity. Davis v. Shafer, *supra*.

⁶ White v. Amsden (Vt.), 30 Atl. Rep. 972.

⁷ Scrags v. Hill (W. Va.), 17 S. E. Rep. 185; Garnsey v. Rhodes, 18 N. Y. Supp. 484 [1892]; but see Cunningham v. M. S. & Ft. C. R. Co., where evidence of conversation of parties supplemental to contract was received; and see Hart v. Thompson (Sup.), 41 N. Y. Supp. 909.

⁸ Joseph v. Richardson, 2 Pa. Super. Ct. Rep. 208.

⁹ People's Natl. Gas Co. v. Braddock Wire Co., 25 Atl. Rep. 749.

¹⁰ Brewster v. Bates, 30 N. Y. Supp. 780.

¹¹ Rose v. Eclipse Carb. Co., 60 Mo. App. 28.

marriage may be inferred from the acts and conduct of the parties towards each other.¹ A defective description of a boundary may be interpreted by evidence of the practical construction the parties put upon it themselves.² The acts of the parties may be shown to indicate whether side-tracks were to be computed as road under a contract at a price per mile of road.³

When there is a dispute as to which of two contracts is binding, the parties may be bound by the one they have adopted. Thus when the contractor insisted that the contract consisted of proposals duly accepted, and the company claimed that the contract was an unsigned written construction contract by whose terms the work had been performed, it was held that the written contract should hold.⁴

The rules that a court in construing a doubtful provision of a contract will follow the interpretation placed upon it by the parties does not apply to contracts made by a municipal corporation in matters affecting the public interests;⁵ and when a board of commissioners has entered in their proceedings a contract, it is not error to exclude parol evidence of their version of it.⁶

Testimony that the stipulations of a contract were the same as those on a block of printed forms from which it had been taken, is inadmissible unless it is shown that the witness compared the contract form with those in the block.⁷

126. Witnesses Cannot Testify as to the Meaning of a Contract.—A witness cannot testify touching the construction of a contract; if a question arise as to its meaning, the question must be settled by the court.⁸ Evidence of the opinion of the parties to a contract as to its meaning, not carried into effect by any act, will not govern its interpretation.⁹ Parol evidence is admissible to prove the existence of a written instrument, no attempt being made to prove the contents thereof.¹⁰

When there is a dispute between the parties as to whether the contract was verbal or in writing, and the evidence is conflicting as to whether the contract was verbal or in writing, the question is for the jury.¹¹ The construction of an ambiguous written contract is for the jury, and a charge as to its meaning is error.¹² Where there is no ambiguity in the terms of a

¹ *Button v. Hibbard* (Sup.), 31 N. Y. Supp. 483; *but see Yale v. Curtiss*, N. Y. Ct. of App., Feb. 1897.

² *Kingsland v. Mayor, etc.*, of N. Y., 45 Hun (N. Y.), 198.

³ *Burke v. Troy, etc.*, R. Co., 37 Vt. 766.

⁴ *Megrath v. Gilmore* (Wash.), 39 Pac. Rep. 131; *and see Mobile & B. Ry. Co. v. Northington* (Ala.), 10 So. Rep. 839 [1892].

⁵ *National Waterworks Co. v. School Dist. No. 7* (Cir. Ct.), 48 Fed. Rep. 523.

⁶ *Board v. O'Conner* (Ind.), 35 N. E. Rep. 1006.

⁷ *International & G. N. R. Co. v. Startz* (Tex.), 27 S. W. Rep. 759.

⁸ *The Alton, etc., R. Co. v. Northcott*, 15 Ill. 49 [1853].

⁹ *Shaw v. Andrews* (C. C.), 62 Fed. Rep. 460.

¹⁰ *Sims v. Jones* (S. C.), 20 S. E. Rep. 905.

¹¹ *Jones v. Sherman* (Neb.), 51 N. W. Rep. 1036.

¹² *Ginnuth v. Blankenship & Blake Co.* (Tex. Civ. App.), 28 S. W. Rep. 828; *Bloom v. P. Cox Shoe Manfg. Co.* (Supp.), 31 N. Y. Supp. 517.

contract, it is the province of the court, and not of the jury, to determine its meaning,¹ and where the terms are ascertained its meaning presents a question of law only, and it is for court.²

It is the duty of the court to construe and determine the legal effect of a written instrument offered in evidence and to instruct the jury thereon,³ and there is no ambiguity or conflict if the intention of the parties to a written contract be intelligible upon the face of the instrument. Outside proof of its meaning is not admissible,—its construction is for the court alone.⁴ Whether certain correspondence constitutes a contract, and its proper construction as such, are for the court.⁵

127. The Intention of Parties should Control.—In the construction of instruments or contracts the first rule to be regarded is to follow the intention of the parties as gathered from the entire transaction, and by looking at all the provisions of the instrument, and not one alone.

All other rules are subordinate to this one, and when they contravene it they are to be disregarded. If the language of the contract is plain and unambiguous, parol evidence is not allowable to ascertain the pretext of the parties thereto. If it admits of more senses than one, it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee.⁶ If the terms of the written contract admit of two meanings, one of which nullifies the contract and the other upholds it, the latter will be adopted and the former must be discarded.⁷

128. Rule against Parol Evidence Applies Only in Suits between the Parties to Contract.—The rule that parol evidence cannot be given to contradict or vary written agreements is limited to the parties actually contracting with each other by the agreement. It cannot be evoked by a stranger to a contract.⁸ It is not excluded in suits between strangers to the written contract, and a surety has been held such a stranger.⁹ Therefore parol evidence is admissible to establish a contract between a broker and his principal though it may contradict or vary the terms of a written contract entered into in pursuance thereof between the principal and the proposed purchaser.¹⁰

129. Contracts Obtained by Fraud or Duress.—Exceptions to the rule

¹ *Levy v. Kottman* (Com. Pl.), 32 N. Y. Supp. 241.

² *Finlayson v. Wiman* (Sup.), 32 N. Y. Supp. 347.

³ *Bell v. Keepers* (Kans.), 14 Pac. Rep. 542 [1887]; *Fidelity Title & Trust Co. v. People's Gas Co.* (Pa.), 24 Atl. Rep. 339; *Barnhill v. Howard* (Ala.), 16 So. Rep. 1; *Woodburg G. Co. v. Mullikin* (Vt.), 30 Atl. Rep. 28.

⁴ *Campbell v. Jimenes* (Com. Pl.), 23 N. Y. Supp. 333.

⁵ *Scanlan v. Hodges* (C. C. A.), 52 Fed. Rep. 354.

⁶ *Potter v. Berthelet*, 20 Fed. Rep. 240 [1884]; *Root et al. v. Johnson*, 26 Vt. 64.

⁷ *Saunders v. Clark*, 29 Cal. 299.

⁸ *Coleman v. Bank of Elmira*, 53 N. Y. 388 [1873]; *First Nat. Bank v. Dunn* (N. J.), 27 Atl. Rep. 908.

⁹ 17 Amer. & Eng. Ency. Law 454; *Coleman v. Bank of Elmira*, 53 N. Y. 388 [1873].

¹⁰ *Barber v. Hildebrand* (Neb.), 60 N. W. Rep. 594.

forbidding parol evidence are those cases where the validity of the written instrument is impeached as having been obtained by duress, menace, fraud, or collusion, which, as is well known, vitiate all acts however solemn or even judicial. To reject parol evidence in such cases would afford protection to practices which it is the object of the law to suppress. A party cannot avoid it by setting up his own fraud, nor can other persons claiming under him.¹

If a contract is attacked on the ground of fraud, parol evidence is admissible to show the fraud.² There must be an allegation of duress, collusion, fraud, misrepresentation, or mistake, or the evidence must be offered to prove the same.³ In the absence of such allegation, parol evidence will not be admitted even in a court of equity.⁴ Therefore a contract for the sale of land cannot be varied by prior or concurrent verbal agreement as to what the settler would do in consideration of the purchase;⁵ nor when subscriptions have been made to a common project, and the parties soliciting the subscriptions have made parol representations to the effect "that men of great wealth will be connected with the enterprise, that great benefit, collateral improvements, and enhancement of the value of real estate will result," or "that certain materials will be used in the building,"⁷ or "that the railroad to be built should connect with other railroads," though the route and termini might be shown.⁸ So in a lease it cannot be shown that the landlord made an agreement at the time it was executed to make improvements,⁹ or that, under a lease that was to be null and void and not binding on either party if the lessee failed to pay his rent, it was intended to give the lessee an option to terminate the lease at his pleasure.¹⁰

If the purchaser had alleged fraud, misrepresentation, or deceit, a court of equity would doubtless have admitted the evidence, as was done in a case where a tenant signed a lease of a farm upon the faith of the owner's parol promise to destroy the rabbits infesting it;¹¹ and in another case where an inventor as an expert made false representations to a purchaser as to the value, merits, and utility of an invention.¹² There are cases to the contrary where misrepresentations as to the validity, value and utility are held mere matters of opinion¹³ and therefore *not* fraudulent. Representations as to

¹ Best's Principles of Evidence. (Chamberlayne's ed.) 235. See Epigraph, Title page.

² Grand Tower, etc., R. Co. v. Walton (Ill.), 37 N. E. Rep. 920.

³ Deloache v. Smith (Ga.), 10 S. E. Rep. 436; Strong v. Waters, 30 N. Y. Supp. 64.

⁴ Brunson v. Henry (Ind.), 39 N. E. Rep. 256; Groome v. Ogden City (Utah), 37 Pac. Rep. 90; Custean v. St. Louis Land Co. (Wis.), 60 N. W. Rep. 423.

⁵ Custean v. St. Louis Land Co. (Wis.), 60 N. W. Rep. 423.

⁶ Paddock v. Bartlett, 68 Iowa 16 [1885].

⁷ Gerner v. Church (Neb.), 62 N. W. Rep. 51.

⁸ Low v. Studebaker (Ind.), 10 N. E. Rep. 301 [1887].

⁹ Lerch v. Sioux City Time Co. (Ia.), 60 N. W. Rep. 611.

¹⁰ Hall v. Phillips (Pa.), 30 Atl. Rep. 353.

¹¹ Morgan v. Griffith, L. R. 6 Exch. 70 [1871].

¹² Hicks v. Stevens (Ill.), 11 N. E. Rep. 241 [1887]. And see note, Best's Chamberlayne's Prin. of Evidence 230; Iowa Economic Heater Co. v. American, etc., Co., 32 Fed. Rep. 735.

¹³ 8 Amer. & Eng. Ency. Law 636.

facts on which the valuation, merits, etc., are based are fraudulent if false.¹

Misrepresentations by a nonexpert as to the legality of an instrument or the legal effect of it are not in general regarded as fraudulent so as to relieve one from the obligation assumed on the strength of such allegation.¹

If one is induced to sign a lease by false statements by the owner that the building leased is fit for certain purposes, evidence of the misrepresentation may be received.² So when it is alleged that certain stipulations and provisions were inserted in a contract by fraud, evidence of prior conversations between the parties is admissible.³ In general, when it can be shown clearly and undoubtedly that certain oral representations, undertakings, and promises, material to the subject-matter of a written contract, induced one of the parties to put his name to it, they may be shown by parol evidence, and the written agreement may be modified, explained, reformed, or altogether set aside by such parol evidence.⁴ Such a case is a subscription contract in which it was falsely represented that another person named had made a similar subscription under the same conditions.⁵

130. Independent Oral Agreements.—It must not be taken that the rule against showing a prior or contemporaneous parol agreement forbids parties making separate written and parol contracts at the same time and as to the same subject-matter. Any number of independent contracts each having its own proper consideration may be made, some parol and others written, and the parol contracts may modify, explain, vary, contradict, or multiply the written ones. The parol agreement may form part of the consideration of the written contract, or the written contract may form the consideration for the contemporaneous parol agreement, if the oral agreement is not inconsistent with the written agreement, and if there is evidence that the parties did not intend the written contract to be a complete transaction.

When oral agreements are made at the time written contracts are entered into, then they should rest upon a separate and distinct consideration; and when they have been arrived at they should be regarded as distinct and collateral agreements, and not a part of the written contract. Parol evidence will be admitted of an oral agreement entered into subsequent to the written contract if the oral contract is supported by a new consideration, and the new parol agreement may become a substitute for the old one, or be an addition to it. If the new oral agreement has taken the place of an earlier written contract which has been lost, oral evidence may also be received to prove the terms of the written contract.

A parol modification of the terms of a written contract, which was

¹ 8 Amer. & Eng. Ency. Law 636.

² Myers v. Rosenbach, 25 N. Y. Supp. 521.

³ Van Alstyne v. Smith, 31 N. Y. Supp. 277.

⁴ Thudium v. Yost (Pa.), 11 Atl. Rep. 436.

⁵ Gerner v. Church (Neb.), 62 N. W. Rep. 51.

required to be in writing by the statute of frauds, cannot be shown in connection with the written contract.

An interesting case, illustrating this rule, was a written contract for the sale of real estate. One of the provisions was, that a certain person should survey the land. The services of this particular surveyor not being obtainable, a verbal agreement was made to procure another, who surveyed the land, after which the grantor refused to convey the premises. In an action for the breach of the written contract it was held that the verbal alteration could not be shown, because such alteration reduced the whole written contract to a mere verbal agreement for the sale of lands, upon which the statute of frauds provides that no action can be maintained.¹ However, this does not hold that certain terms of a written contract cannot be waived by parol agreement.^{2*}

Oral evidence is admissible to show that the time of performance or completion was extended or the date changed by a subsequent agreement, whether the contract be sealed or unsealed, or even within or without the statute of frauds,³ and it may be shown that the terms of a written contract, even one within the statute of frauds, have been waived or discharged.⁴

131. Subsequent Promises must be Founded upon a Consideration.—A consideration without doubt is necessary to support such contracts to modify or rescind a written contract,⁵ but it is not to be understood that by consideration is meant a money consideration. The court will, if possible, find a consideration to support promises for extra work, extension of time, changes in the plans, specifications, etc. If there have been changes by the owner, these may afford sufficient consideration for an extension of time, or for extra remuneration, even though the expense has not been increased. If the contractor has found the work more difficult than he anticipated, it is an easy matter for him to allege misrepresentation on the part of the owner or his engineer or architect, and "trump up" a claim which, however trivial, may afford a consideration for a new agreement on the part of the owner, it being impossible for the court to ascertain how sincere he may have been in his claims or what value it may have had at the time.⁶ So when a building fell before it was completed, it being disputed as to whether it was the contractor's or owner's fault, it was held that the question of doubtful liability was a sufficient consideration to support a new promise by the owner.^{7†}

¹ *Dana v. Henry*, 30 Vt. 616 [1858].

² *Hill v. Blake*, 97 N. Y. 216; 17 Amer. & Eng. Ency. Law 448.

³ 17 Amer. & Eng. Ency. Law 449; *Luckart v. Ogden*, etc., 30 Cal. 547; *Morrill v. Colehour*, 82 Ill. 618.

⁴ 17 Amer. & Eng. Ency. Law 449.

⁵ *Bruce v. Brown* (Tex.), 25 S. W. Rep.

* See Secs. 559-564, *infra*.

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⁶ *Hart v. Launman*, 29 Barb. (N. Y.) 410; *Osborne v. O'Reilly*, *supra*; *Holmes v. Doane*, 9 Cush. 185; *Wilgus v. Whitehead*, 6 W. N. of C. 537; *Cooke v. Murphy*, 70 Ill. 96 [1873].

⁷ *Brodeck v. Farnum* (Wash.), 40 Pac. Rep. 183.

† See Sec. 563, *infra*.

Where a contractor was under a penalty (liquidated damages), to complete work, it was held that under a release of the contractor from the contract, a promise to pay for day labor, by the owner, was supported by the fact that the contractors could have abandoned the contract by paying the penalty, and they had incurred a detriment by keeping at work, which they were not obliged to do.

The consideration may be found in the mutual promise to annul certain terms or to rescind the whole agreement and to then enter into a new parol agreement, the agreements on the one side to rescind being the consideration for the agreement to rescind and the new undertakings on the other side. That no new and extraneous consideration is necessary in ordinary construction contracts has been frequently held,* though there are cases to the contrary.

* See Secs. 69, *supra*, and 560-563, *infra*.

PART II.

BIDS AND BIDDERS.

CHAPTER VI.

THE RIGHTS AND LIABILITIES OF BIDDERS FOR PUBLIC WORK.

THE ADVERTISEMENT, INSTRUCTION TO BIDDERS, AND FORMS FOR PROPOSALS. FORMALITIES, REQUIREMENTS, AND RESTRICTIONS IMPOSED ON BIDDERS.

132. Mode of Entering into Construction Contracts.—In treating the subjects of construction and construction contracts it will not be necessary to go into the preliminaries of organization of companies, or of securing charters, or floating the stock. These are affairs that usually have been attended to before the engineer, architect, builder, and contractor are called upon to lend their assistance. When the company has been created and the privileges, permits, grants, or franchises have been obtained, it is then that the services of the industrial element are sought.*

When an owner or company contemplates the erection of works large enough to require the services of an experienced and skilled mechanic, it is a general practice in this country to invite contractors to make offers or proposals to do the work required at a price named. The invitations are something private, and sent to such persons only as the owner or company may desire to do business with; or they may take the character of public solicitations, or advertisements for proposals.

The instructions, explanations, and statements of the terms and specifications attending such negotiations are frequently of considerable importance and compass, which parties to the contract and their agents should understand. The acts and ceremonies attending these negotiations arise from the desire of the owner or proprietor to retain the privilege of creating and completing the contract.

The letting of a large construction contract does not differ greatly in

*The engaging and retaining of the professional services of the engineer or architect, and the relations and duties created by their contract of employment, will be discussed in a later chapter. See Part IV., Secs. 800-900, *infra*.

principle from the bartering and selling of every-day life. Before two parties can enter into a contract they must come to terms, that is, they must have a common understanding of the terms of their agreement.* This is essential to a binding contract. The usual way of entering into a contract is by one party stating certain terms and the other party assenting, both parties agreeing to be bound by those terms. The formal declaration of an agreement to abide by the terms proposed is not necessary. When the statement of terms takes the form of an offer, and the assent that of an acceptance of those terms as made, within a reasonable time or before the offer is recalled, such offer and acceptance constitute a binding contract. This fact, that a contract can be created by the simple act of accepting an offer, has been a prime factor in establishing the ceremonies that precede the execution of a construction contract. Neither the proprietor nor the contractor, the seller nor the buyer, desires to make the initial offer. Each wants to make an agreement or bargain which is to his best interest, and whoever makes the offer sacrifices his chance of getting anything better than he himself has offered. If his offer is accepted, the contract is completed; while the party to whom the offer was made may decline and solicit other offers. In every-day business affairs this gives rise to fencing and sounding to determine who shall commit himself to the terms of an offer. If it be a horse to sell, the seller will want the purchaser to make him an offer, and the buyer will want the seller to name a price. The buyer wants to buy at the lowest price, and he knows that if he make an offer it may be accepted, which closes the bargain, and he may have paid more than he need to have paid had he known the mind of the seller. The same principle prevails in larger transactions, but there are several bidders usually for each contract. Proprietors having work to be performed insist upon receiving offers instead of making them. This is eminently just, for it requires the party to prepare and make the offer who is best qualified to undertake it. A skilled mechanic with a large experience in contracting and building can certainly better determine the proper cost of an undertaking, and should therefore be the one to offer terms by which he will undertake the execution of a contract for such work. Under these conditions the present system of inviting proposals has become universal. Proprietors and corporations having work to be done have found it to their advantage to insist that it is their just privilege to invite offers or proposals, not from one contractor but from several.

By announcing that several proposals will be received, and that the proposal will be accepted which is most advantageous to the proprietor, contractors desirous of securing the work are induced to make close estimates and thus give to the party inviting the offers the benefit of competition. The contracts for all private works of importance, and for nearly all public

* See Secs. 88-98, *supra*.

works are entered into only after these preliminary negotiations. The invitations to make offers is called the *advertisement* for proposals; the offer itself is called the *proposal*, *tender*, or *bid*; the acceptance of the offer is the *awarding* of the contract, and the completion of the *ceremony*.

The fact that a proposal or bid is but an offer should not be lost sight of however much it is enshrouded with instructions, restrictions, and conditions, and that the advertisement is not in general an offer, but an invitation to contractors or builders to make offers.¹

The act or charter of many public organizations requires that the work be advertised and proposals solicited from the public.

The advantages of this system of letting work are twofold. (1) If honestly carried out by both parties, it gives to the owner the benefit of close competition, and (2) the privilege of accepting the proposal if the offer is a good one, or of declining it if it is unreasonable. By inviting proposals the owner retains the privilege of assuming the contract obligation to himself, while the contractor in making the proposal may have the obligation of a contract imposed upon him by the mere acceptance by the owner of his offer in the same terms in which it was made. An offer plus an acceptance makes a contract, the obligation of which cannot be escaped. An offer may be recalled or revoked at any time before it is accepted, but not afterwards. To prevent bidders from recalling their offer, bidders are usually required to accompany their proposals with a certified check, which is forfeited if the offer is revoked.

The advantage of competitive bids for work cannot be overestimated if they are honestly made and the contract conscientiously awarded to the lowest responsible bidder.

To get such proposals as can be compared they should one and all be made from precisely the same data, and with the same means afforded to all for observation and study. A word or a wink that tends to give one contractor the advantage over another is an evil practice that undermines the whole system, and is an injustice to the owner and to all the other bidders. If discovered, it affords a ground for attacking the contract awarded upon such a bid, and may result in the contractor losing all that he has earned.

133. The Advertisement or Notice to Bidders—Invitation to Contractors and Builders to Make Proposals.

.....IMPROVEMENT.
PROPOSALS FOR BUILDING
..... *Engineer's Office*,
..... *Broadway, New York City*,
....., 189..

"SEALED BIDS [OR PROPOSALS] for the construction or erection or for furnishing all the labor, tools, appliances, etc., and materials necessary to build, to erect, and to do all the....., and to com-

¹ Lloyd's Law of Buildings (2d ed.), § 56; Forster v. Ulman, 64 Md. 523.

plete a certain....[name of structure or work]....at or on....[name of way or stream]....in the town or city of....., county of....., state of....., are invited, and will be received at the office of....., engineer or architect, or at the office of the Board of Commissioners of the Public Works, City Hall, city of....., state of....., until.....o'clock....M. of....day of the week....the....day of....., 189.., at which place and hour the bids will be publicly opened and read

"The bids will be compared on the basis of the engineer's estimate of the materials and work to be done, which is as follows:

Items, [a].....[b].....[c]....., etc.

"The work is to be commenced within....days after the execution of the contract, and to be continued with regularity until completed, which must be before the....day of....., 189..

"The amount of the bond required for the fulfillment of the contract will be the sum of...thousand dollars"; or, "The security required for the fulfillment of the contract will be...per cent. of the contract price."

"The contract will be awarded to the lowest responsible bidder without reserve"; or, "The right to reject [any and] all bids is reserved if the engineer, architect, commissioners, or board shall deem it for the best interests of the company, city, or state.

"General instructions for bidders, blank forms for proposals, plans and specifications and contract forms, and all other necessary information may be had [or obtained] at the office of the engineer or architect, ...

"Signed.....

"Dated....."

134. The Form of Advertisement to be Adopted.—In adopting the forms here presented for the letting of construction contracts the author has adopted what seems to be a rational subdivision, and one that does not depart materially from established forms in use on public works. Advertising is expensive, and neither individuals, companies, nor the government can afford to publish full and explicit instructions to bidders in the general or technical periodicals. The advertisement need, therefore, contain only general information such as shall enable a contractor to determine if he would like to undertake the work. It should describe the character of the structure, work and materials required, its location, the magnitude of the undertaking, when it must be commenced and when completed, the amount of security required, whether or not the lowest bid will be accepted without reserve, the last day on which the bid will be received, where further information may be secured, and who are the parties that invite proposals; and if it be public work, the attention of the bidders should be invited to the act of congress or of the legislature, or to the ordinance, under which, or by virtue of which, the work is undertaken or authorized or by which it is controlled.

This information is ample to advise a contractor whether the job is in his line, whether it is within his capacity as to the execution of the work in the time named, whether he can furnish bonds and has time to make a careful estimate, and finally, whether he will compete for and undertake

requires that "a special ordinance ordering the work to be done shall be passed before a public improvement is made, and a general ordinance has been passed which declared that the council shall order the construction of the improvement proposed, and directed the engineer to advertise for bids therefor," it was held that the fact that bids are advertised for before the special ordinance is passed will not invalidate the proceedings.¹

Usually all preliminary acts and resolutions are held conditions precedent to taking final steps to letting the contract.²

The posting of a notice from 9 o'clock A.M. of the first day and which remained posted until 4 o'clock P.M. of the fifth day was held to have been posted five official days.³ An advertisement stating that bids would be received up to a certain hour on Saturday, September 19, 1875, when the 19th was Sunday, was held an unimportant mistake, the notice being otherwise sufficient as to time.⁴

When it is required that the board of public works should advertise, an advertisement issued from the office of the board signed by its president, and stating that a satisfactory bond must be filed with the board, was held sufficient.⁵

136. Instructions to Bidders—Work is Undertaken by What Authority and under What Restrictions.

PUBLIC WORKS,.....
.....IMPROVEMENT.
PROPOSALS FOR BUILDING.....

..... *Engineer's Office,*
..... *Broadway, New York City,*
....., 1897.

GENERAL INSTRUCTIONS FOR BIDDERS.

"This work is undertaken by virtue of (or in accordance with, or in obedience to, or to conform to, or to comply with) ordinance....., (act of legislature, the act of.....incorporation....., or under the charter of the city of....., or the..... company, or acts of congress) approved the....day of....., 189..., under which act (or charter, or ordinance) this improvement is undertaken, and to which the attention of bidders is especially invited.

"The attention of bidders is also invited to the acts of congress approved 1885, as printed in Vol. 24, page 414, U. S. Statutes at Large, which prohibits the importation or immigration of foreigners and aliens under contract or agreement to perform labor in the United States or territories or the District of Columbia.

"The attention of bidders is especially called to the provisions of legislative act, chapter 277, Laws of New York of 1894; and act chapter 413, Laws of New York of 1895, relating to the dressing and carving of

¹ *City of Springfield v. Weaver* (Mo. Sup.), 37 S. W. Rep. 309; *Keane v. Cushing*, 15 Mo. App. 96, *disapproved*.

² *Corsicana v. Keer* (Tex.), 33 S. W.

Rep. 794.

³ *Keeeland v. Furlong*, 30 Wis. 437.

⁴ *Case v. Fowler*, 65 Ind. 29.

⁵ *Beauveau v. Detroit*, 41 Mich. 116.

stone used in New York state work; and also to the provisions of act chapter 622, Laws of New York of 1894, relating to the hours of labor and rate of wages, and to the employment of citizens of the United States."

137. Necessity for Restrictions and Regulations.—Public work is usually authorized by an act of congress or of the legislature of the state, or is undertaken under a charter or franchise bestowed by the government. The fact that it is public work implies that it is for the benefit of the public, and that public interests are involved which must be protected.

To secure competition and prevent combinations and conspiracies tending to favoritism and to defraud the people and the government, it is therefore usual to incorporate into the act or charter a clause requiring the work to be advertised, bids solicited, and the contract awarded to the lowest (responsible) bidder.

138. The Requirements of the Act or Charter are Imperative.—When such an enactment has been made, it is not directory merely, but it is imperative in the requirement that specifications shall be prepared and published, the work advertised, and the contract awarded to the lowest bidder.¹ The law is interpreted strictly, for when in an act the legislature declares that a board of public works "may" advertise for proposals, etc., it has been construed to mean that they "shall" advertise for proposals;² but in another case under a statute which provides that a board shall have control of the construction of improvements, and that it may advertise for proposals and *may* accept or reject any proposals, it was held discretionary with it to advertise or not as it might elect.³ *

When there are two sections to an act, one of which provides that the board of supervisors "must" contract for publishing the delinquent tax list with the lowest bidder after ten days' notice of the letting of the contract, and the other requires the tax collector to publish the delinquent list by a certain date, it was held that, on failure of the supervisors to contract for publishing the list, the tax collector was not authorized to do so.⁴

Under an act which gave an election to commissioners either to carry on the works by their own engineers and with labor employed and materials furnished by themselves, or to let out the whole or parts of the work by contract to the lowest bidder after advertising in the newspaper for proposals, it was held that, the commissioners having elected to let the work out by the latter method, they must give it to the lowest bidder, and a contract awarded to one who was not the lowest bidder according to the terms and

¹ *Beaver v. The Trustees*, 19 Ohio St. 97, and cases cited; *Dallas v. Ellison* (Tex.), 30 S. W. Rep. 1128; *Greene v. New York*, 1 Hun (N. Y.) 24.

² *McBrian v. Grand Rapids*, 56 Mich. 95.

³ *Fitzgerald v. Walker* (Ark.), 17 S. W. Rep. 702 [1891]; and see *People v. Buffalo*,

25 N. Y. Supp. 50, 5 Misc. Rep. 36; and *Santa Cruz Co. v. Heaton* (Cal.), 38 Pac. Rep. 693; *Smeltzer v. Miller* (Cal.), 45 Pac. Rep. 264.

⁴ *Smeltzer v. Miller* (Cal.), 45 Pac. Rep. 264.

* See Secs. 50-55, *supra*.

specifications advertised and proposed, was unauthorized and void.¹ When commissioners, by a single vote, have once elected the manner in which work shall be done, their power of designation is gone.² Bids for public work need not be invited unless it is expressly required by statute, charter, or ordinance.³ The provisions of a city charter requiring contracts to be made upon advertisement and sealed proposals have been held not to apply to contracts by the commissioner of public works for public work authorized by special enactment.⁴ The improvement of a public park belonging to a city has been held not a public improvement within an act requiring the city to advertise for bids for work and materials for public improvements.⁵ If the provisions of the law be not carried out, and a contract be awarded in a manner contrary to the express requirements of the statutes and charters of the city or company, the irregularity may be set up as a defense to the action on the contract.⁶

Contracts by a municipal corporation, a county, or the state must be within the act creating them and within the privileges and powers of their charter, constitution, or organization, or they are void, and the contractor may recover nothing for his labor and materials. The statutes are obligatory and not merely directory.⁷

If work has been done under a contract which is void for having been entered into in violation of an express provision of the statute law or the charter, constitution, or ordinance, the contractor cannot recover for the work done or the materials furnished: not on the contract, because the contract is void, which is equivalent to saying there is no contract; and not on an implied contract or *quantum meruit*, because there is nothing from which to imply a request to do the work except in the manner required by law; or by request of the public officer who assumed to make a contract which is null and void, not having the necessary authority.⁸

The requirements of the act that, before the awarding of any contract for any work authorized by the act, the city council shall invite sealed proposals, and shall award the contract to the lowest bidder, apply to every contract authorized by the act, irrespective of the character of the work to be done, or of the mode in which the expense is to be paid.⁹ If the charter provide that no contract shall be made for any public work, or for any supplies for

¹ *Dickinson v. City of P.*, 75 N. Y. 65 [1878]; *Bigler v. Mayor of N. Y.*, 5 Abb. N. Cas. (N. Y.) 51.

² *Bigler v. Mayor of N. Y.*, 5 Abb. N. Cas. (N. Y.) 51; *accord People v. Board of Improvement*, 43 N. Y. 227.

³ *Cummings v. Seymour*, 79 Ind. 491; *Kingsley v. Brooklyn*, 5 Abb. N. Cas. (N. Y.) 1; *Yarnold v. Lawrence*, 15 Kans. 126; but see *Adamson v. Nassau Electric R. Co.* (Sup.) 33 N. Y. Supp. 732.

⁴ *Greene v. Mayor of N. Y.*, 60 N. Y. 303.

⁵ *Walsh v. Columbus*, 36 Ohio St. 169.

⁶ Many cases cited in 15 Amer. & Eng. Ency. Law 1091.

⁷ *Evans on Agency* 211, 212; 15 Amer. & Eng. Ency. Law 1084-5 and cases cited; *Young v. Mayor of Leominster*, L. R. 8 App. Cas. 517 [1883]; and see *Smith v. New York* (Sup.), 31 N. Y. Supp. 783.

⁸ *Bonesteel v. Mayor*, 22 N. Y. 162; and many cases in 15 Amer. & Eng. Ency. Law 1085.

⁹ *Santa Cruz Rock-Pavement Co. v. Broderick* (Cal.), 45 Pac. Rep. 863.

* See Secs. 50-53, *supra*.

the city, and no such work or furnishing supplies shall be commenced, until the contract therefor has been approved by the council, all contracts must be submitted to the council for its approval or disapproval, without regard to auxiliary and supplementary powers to contract conferred upon commissioners, boards, and other officers.¹

It is imperative that a contractor exercise every precaution to have the contract in accordance with the law, for although the city officials may be honest and honorable, and the city be inclined to meet his just claims, yet any person interested, as any taxpayer, can object and have mandamus issue against the city to prevent a recovery for anything that has been done under an illegal contract.*

139. Instructions Should Give All Necessary Information to Bidders.—Any irregularity in the proceedings directed by the act or charter by which the work is authorized to be observed may avoid and destroy the contract. Therefore when public work is required to be let to the lowest responsible bidder upon notice of the work or material required, such notice should give all the necessary information to enable parties desiring to bid to make estimates. Resort cannot be allowed to mere verbal explanation to ascertain substantially all that is contemplated to be done, as that might lead to favoritism and other mischief intended to be avoided by the statute.*

If a charter provide that before proceeding with any proposed public improvement the detailed estimates of the costs of such work or improvements shall be made, and if the city ordinance provide that the owner is entitled to notice of the intended improvement, a contract made without any estimate of the cost and without proper notice of the improvement is illegal and not binding. The proceedings are void, and the collection of a tax levied to pay for the improvement may be properly enjoined.² If the act or charter requires public notice of proposals and that the contract be awarded to the lowest responsible bidder giving adequate security, and security be furnished by the lowest bidder, any contract not in strict compliance with the law or charter is unauthorized and void.³ If the act requires that a certain number of days' notice be given of the time for the bids, it is mandatory and must be complied with.⁴ The illegality can be pleaded in defense to any action on a contract which has not been made strictly as required by the law.⁵

¹ Common Council of Detroit v. Public L. Comm. of Detroit (Mich.), 59 N. W. Rep. 654; People v. Waring (Sup.), 39 N. Y. Sump. 193; and see Alford v. Dallas (Tex.), 35 S. W. Rep. 816.

² Littler v. Jayne, 124 Ills. 123 [1889].

³ Mills v. City of Detroit (Mich.), 54 N. W. Rep. 897.

⁴ In re Enger, 46 N. Y. 100; Maxwell v. Stamlaus, 53 Cal. 389; People v. Gleason, 131 N. Y. 631 [1890]; Smith v. Mayor, 10 N. Y. 504.

* See Secs. 177, 178, *infra*.

⁵ Boerd v. Gillies (Ind.), 38 N. E. Rep. 40.

⁶ Dillon's Munic. Corp'ns, § 466 (4th ed.), and cases cited; McDermott v. Board of Jersey City, 28 Atl. Rep. 424; Shaw v. Trenton, 49 N. J. Law 339; State v. Cunningham (Neb.), 59 N. W. Rep. 485; Heidelberg v. St. Francis Co., (Mo.), 12 S. W. Rep. 914 [1889]; Littler v. Jayne, 124 Ills. 123 [1889]; Dickinson v. Poughkeepsie, 75 N. Y. 65 [1878]; Davenport v. Klien-schmidt, 13 Pac. Rep. 249 [1887].

† See Secs. 133, 134, *supra*.

When the statute required "good and sufficient security for the performance of the work," a contract given to the lowest bidder without requiring "good and sufficient security" is not legal, and the contractor cannot recover for the work when done, it not having been accepted or used.¹ The neglect to insist upon security is not material where the charter provides for "good and sufficient security, as required by said board," it not appearing that the board required any security.²

When the laws require that certain work be let or franchises be sold, such statute requires that the transaction be on a cash basis or for cash, and an offer to pay percentage of the gross receipts, or to do or provide any other thing, in consideration of such a franchise, cannot be considered.³

140. There Must be Competition, in Compliance with the Statute or Charter.—The power of the city to make contracts is limited and can only be exercised in the manner prescribed. There must be competition before a contract can be awarded.⁴

If a charter provides that the contract be given "to the lowest responsible bidder giving adequate security," officials authorized to let the contract may not arbitrarily reject the lowest bid and accept a higher bid without facts justifying it; there must be facts tending to show that the lowest bidder was not responsible, or at least some pretense to that effect.⁵

Canvassing by the engineer, or permission by him to the contractor to alter the bid where the proposals have been referred to him for calculation and comparison, or any acts by which one bidder who was not the lowest bidder is made to appear the lowest, will render the contract void and unauthorized.⁶ The making of a contract at different prices, and according to a different classification of the kind of work, and with new and material clauses inserted, which were not offered to the other bidders, will destroy the obligations of the contract and render the contractor's rights thereunder null and invalid. He cannot recover for what his work is reasonably worth.

A contractor should insist upon the contract being executed in the same terms and according to the plans and specifications upon which he has made his bid, and whether to his favor or detriment should be no excuse for his not requiring it. Engineers and commissioners will realize the great detriment they may cause their favorites and friends by seeking to benefit them or favor them to the exclusion of other competitors. The law is well settled, and anything which does not fairly and fully satisfy the requirements of the statute, and does not secure to the state or city the full benefits of the competition which is sought, may render the contract void and not binding upon the city.⁷

¹ Mackey v. Columbus (Mich.), 38 N. W. Rep. 599 [1888].

² Carey v. East Saginaw (Mich.), 44 N. W. Rep. 168.

³ Thompson v. Board of Sup'rs (Cal.), 44 Pac. Rep. 230.

⁴ Shaw v. Trenton, 49 N. J. Law 339

[1887].

⁵ People v. Gleason, 121 N. Y. 631 [1890].

⁶ Dickinson v. City of Poughkeepsie, 75 N. Y. 65 [1878]; Smith v. Mayor, 10 N. Y. 504.

⁷ Dickinson v. City of Poughkeepsie, 75 New York 65 [1878].

141. Public Officers cannot Legalize nor Ratify Void Contracts.—Such contracts are not merely voidable; they are void and cannot be made valid by subsequent acts of the city or its officials.¹ Nothing is added to the legality of a claim under such a contract by the common council auditing and allowing it, for they have no jurisdiction so to do.² Though the contract was let to one who was apparently, but not in fact, the lowest bidder, it cannot be made binding upon the city by acceptance of the materials or by ratification by an officer or otherwise, except in the form prescribed by law.³ Nor does the auditing of such a claim by the board of audit stop the city from denying liability on the ground of fraud in the making of the contract.⁴ A contract let when the appropriation for the work was insufficient, is not ratified by a subsequent appropriation.⁵

Where the charter requires that, before any improvement shall be commenced, the city council shall pass a resolution ordering the same to be done, the council cannot, after the improvement has been completed, pass an ordinance ordering the same to be done, so as to render an assessment therefor against the property owners valid.⁶ And when an act provides that "no person shall be employed or permitted to teach in any of the public schools of the state, * * * who is not the holder of a lawful certificate of qualification or permit to teach, any contract made in violation of this section shall be void"; it was held that where a teacher is employed who does not hold a certificate, the subsequent procurement of such certificate does not render the contract of employment valid.⁷ If a city charter provides that a city is not bound by any contract unless authorized by an ordinance and in writing, officers of the city cannot bind it by a contract not in writing.⁸ A re-awarding of the contract by the common council over the veto of the mayor and without any question or objection that the lower bids were formed and made by responsible parties, does not make it any more valid.⁹

When contracts are required to be let to the lowest responsible bidder and approved by the governor, and an act makes the payment or acceptance of money for refraining from bidding a misdemeanor, and the criminal code imposes a punishment for a conspiracy to prevent bidding, a letting to a firm, which is formed for the purpose of preventing bidding, some of whose members have been paid by the others for refraining, is void, not

¹ Dillon's Munic. Corp'ns (4th ed.), § 466, and cases cited; *N. el v. San Antonio* (Tex.), 33 S. W. Rep. 293; *Santa Cruz Pav. Co. v. Broderick* (Cal.), 45 Pac. Rep. 863.

² *People v. Gleason*, 121 N. Y. 631 [1890], distinguishing *E. R. Gas L. Co. v. Donnelly*, 93 N. Y. 557; *Arnot v. Spokane* (Wash.), 33 Pac. Rep. 1063; *Com'rs v. Boyle*, 9 Ind. 296, and note, 68 Am. Dec. 293, and 4 Amer. & Eng. Ency. Law 364.

³ *Nelson v. City of New York* (N. Y. App.), 29 N. E. Rep. 814; affirming 5

N. Y. Supp. 688.

⁴ *Nelson v. City of New York*, *supra*.

⁵ *Indianapolis v. Wann* (Ind.), 42 N. E. Rep. 901.

⁶ *Buckley v. City of Tacoma* (Wash.), 37 Pac. Rep. 441; and see *Ellis v. Cleburne* (Tex.), 35 S. W. Rep. 495.

⁷ *H. Smer v. Sheldon School Dist.* (N. D.), 59 N. W. Rep. 1035.

⁸ *Arnot v. City of Spokane* (Wash.), 33 Pac. Rep. 1063.

⁹ *People v. Gleason*, 121 N. Y. 631 [1890].

twenty per cent. of the same due for a failure to comply with such law, was held unconstitutional as being special or class legislation.¹

Statutes requiring contractors and employers to pay their help wages in lawful money, and prohibiting payment by orders, "store-pay," etc., have been held constitutional where their application has been general and to all classes of employers.² But when the laws require that mine owners and manufacturers shall pay their help in lawful money of the United States, at regular intervals, and fails to include persons and companies engaged in other pursuits, then it is class legislation and unconstitutional. It has been so held in West Virginia, Illinois, Missouri, Pennsylvania.³

Under the laws of State of New York it is a misdemeanor punishable with a fine for a contractor to employ any one but citizens of the United States on state or municipal work. Recently the supreme court of the state rendered a decision that the law could not be enforced with regard to Italian laborers, as it conflicted with the treaty between the United States and the king of Italy, which guarantees the latter's subjects residing within the territory of the former country all the rights and privileges with respect to trade and employment that are enjoyed by citizens.⁴

The constitution and laws of the states are subordinate to every treaty made by the authority of the United States, and if the laws of any state refuse certain rights to foreigners or aliens which the treaty of their country secures to its subjects, then such laws are void.⁵ A statute that forbids aliens who cannot qualify as electors from fishing in the waters of the state was held in violation of our treaty with China, and therefore void.⁶ The right to reside in a state implies the privilege of trading and laboring, and a statute which forbids certain aliens from working in a mining claim, whether for themselves or for others, was declared null and void.⁷ That the states as well as their citizens are bound by treaties of the Federal government cannot be doubted.⁸

145. Form of Notice and Instructions.—The notices usually require certain declarations by the bidder, which he must make to entitle his bid to consideration, and specify certain reasonable restrictions and qualifications that are made necessary to become a bidder.

NOTICE TO BIDDERS. GENERAL INSTRUCTIONS AND CONDITIONS.

Notice.—Bidders are advised that any and all bids deficient in any of the following requirements may be rejected as informal.

¹ San Antonio, etc., R. Co. v. Wilson (Tex. 1892), 50 Amer. & Eng. Corp. Cas. 518.

² Peel Splint Coal Co. v. State (W. Va.), 15 S. E. Rep. 1000.

³ 23 Amer. & Eng. Ency. Law 936-7; but see Hancock v. Yarden, 121 Ind. 366, contra; and see Shaffer v. Union Min. Co., 55 Md. 74.

⁴ Justice White, in People v. Warren, 18 Misc. Rep. (N. Y.) 615 [1895].

⁵ 1 Amer. & Eng. Ency. Law 465, and cases cited.

⁶ In re Ah Chong v. U. S., Pac. Coast L. J., June 12, 1880.

⁷ Chapman v. Toy Long, 4 Sawy. (U. S.) 37; Baker v. Portland, 5 Sawy. (U. S.) 566.

⁸ The La Ninfa (C. C. A.), 75 Fed. Rep. 518; The Alexander (C. C. A.), 75 Fed. Rep. 519; and see Hollman v. Shoulters (Cal.), 44 Pac. Rep. 915.

Capacity to Contract.

A bid will be accepted from, or contract awarded to, any corporation that shall have furnished satisfactory proof of its legal capacity to enter into and perform the same contract.

Bidders in Arrears or Default.

A bid will be accepted from or contract awarded to any person or corporation who is in arrears to the Proprietor, State, or City, upon debt contract, or who is a defaulter as surety or otherwise upon any obligation to the Proprietor, State, or City.

Bidder must be a Practical Contractor or Builder.

Proposals from parties who are not known to be regularly and practically engaged in the class of work called for by the drawings and specifications, and to possess ample facilities for doing the same, will not be accepted.

Bidder must be Qualified.

The bidder must satisfy the engineer or commissioner of his ability to furnish the materials and perform the work for which he bids.

No Assistance from Officers or Employees.

Proposals must be prepared without the assistance, additional information, or suggestion of any person belonging to, employed by, or holding office in the Company, State, or City.

Government Officers can have no Interest.

In work for the Federal Government this clause is often inserted: "No member of or delegate to Congress, nor any person belonging to or employed in the.....service of the United States, shall have any interest in the contract for this work or any benefit that may arise therefrom; but if the contract be made with an incorporate company for the general benefit, this rule will not be construed to extend to this contract so far as it relates to members of Congress."

No Interest in Other Bids.

On reasonable grounds for supposing that any bidder is interested in more than one proposal for the same item may cause the rejection of all proposals in which he is interested.

All Persons Interested must be Named.

Bidders are required to state in their proposals or estimates their names and places of residence, their business and the names of all persons interested with them therein; and if no other person be so interested, they shall distinctly state the fact.

Bid, Fair in all Respects.

The proposal must state that it is made without any connection with any other person making any bid or estimate for the same purpose, and that it is in all respects fair, and made without connection or collusion with any other person making proposals for the same work or materials.

Statement that no Officer or Employee is Interested.

Bidders are required to state that no person employed or appointed under any city ordinance, legislative act, or act of Congress relating to the.....[name of work].....has any interest in the proposal; that no member of the Common Council, Head of a Department, Chief of a Bureau, or any Deputy thereof, or Clerk therein,

or any other Officer of the State, City, or Corporation is directly or indirectly interested therein, or in the supplies or work to which it relates or in any portion of the profits thereof.

II. Declaration as to Truth of Statements.

The proposal or estimate must be verified by the oath in writing of the party or parties making the same, that the several declarations and matters stated therein are in all respects true; and if more than one person is interested in the proposal, it is required that the verification be made and subscribed by all parties interested; in case of a firm, by each and every member of the firm.

146. Bidders May be Required to Possess Certain Qualifications.—The extent to which bidders may be required to conform to the "red tape," so called, which is prescribed in the instructions to bidders, and which is so distasteful to practical contractors and builders, must be determined by its reasonableness; and as the powers conferred upon public officers are largely discretionary, it may be said to be almost unlimited. The recording of all information and data as to the parties, their names, addresses, names of members of firms and officers of corporations, and the authority by which they act is necessary to good business methods.

When commissioners or a board of public works have been authorized to invite proposals and to award contracts under certain acts or laws, they may prescribe in their notice to bidders any reasonable formality to be observed that does not interfere with or prevent fair competition, even though the court can assign no reason for or purpose to be served by the specification or requirement.¹

Neglect on the part of the bidder to conform strictly to the forms and reasonable requirements so prescribed will be fatal to his chances of receiving the award of the contract. No bid should be received that does not comply with the instructions to bidders. If a proposal is informal and irregular, it cannot properly be considered.² A reference in the bid to "plans," "specifications," and "diagrams" has been held to be to the plans, etc., furnished the bidder and from which he was supposed to make his estimate.³ The bid must not be lacking in definiteness: it must be clear as to quantity, quality, and price. A bid to supply materials "at what it cost to lay them down" is too indefinite.⁴ A specification for electric lights which stated the candle-power, but failed to name the system, was held sufficiently definite.⁵ The omission in a proposal of two items of comparatively insignificant value will not render invalid a bid which is otherwise proper in form.⁶

¹ *Re Marsh*, 83 N. Y. 435 [1881]; *State v. Governor*, 22 Wis. 110 [1867]; *Faunan v. Comm'rs*, 21 Ohio St. 311 [1871]; *Interstate, etc., Co. v. City of Phila.* (Pa.), 30 Atl. Rep. 383; *May v. Detroit*, 2 Mich. N. P. 235; *State v. Board*, 42 Ohio St. 374; but see *People v. Contracting Board*, 46 Barb. 254 [1865].

² See *Wiggins v. Philadelphia*, 2 Brews. (Pa.) 444; *Weed v. Beach*, 56 How. Pr. (N. Y.) 470; *Re Marsh*, 83 N. Y. 431.

³ *Sexton v. Chicago*, 107 Ill. 323.

⁴ *State v. York Co. Comm'rs*, 13 Neb. 57.

⁵ *Detroit v. Hosmer* (Mich.), 44 N. W. Rep. 622.

⁶ *State v. York Co. Comm'rs*, *supra*.

The reasonableness of the first requirement, that corporations, and all parties, for that matter, should demonstrate their capacity to contract, is too evident to require discussion. Legal capacity of the parties to contract is the first element of a binding agreement.

147. Restrictions which Exclude Certain Persons from Bidding.—The reasonableness of a restriction which denies certain persons the privilege of bidding is not so apparent in that it renders it possible for the parties having the power to award the contract to foster favoritism by excluding experienced as well as inexperienced persons who have been so unfortunate as to have had differences with public officers. A clause that provides that bids from "persons in arrears to the government or who are in default either as contractors or as sureties will not be received," or that "the bidder must be known to be regularly and practically engaged in the class of work bid for," must give to some one the determination of these questions. If a public officer is inclined to be very exacting or officious, he is certain to raise these questions. Whether or not a contractor *is* in arrears or default is a question that sometimes requires a long time to settle conclusively; and the amount of experience a man should have had to be capable of undertaking certain work, the precise character of which may never before have been met, would be a question which no two persons would determine alike. If such questions were decided by an engineer or officer arbitrarily, and the courts subsequently found that the contractor was not in arrears or default, or that he was capable and his bid had proved to be the lowest bid for the work, it might prove an unhappy restriction, the reasonableness of which would be questionable. Decisions of boards under such restrictive clauses should receive the closest scrutiny of the courts.

In Pennsylvania it has been held that a court would not control the discretion of public officers in such a case, and that it was proper to refuse a contract to the lowest bidder, although he was pecuniarily responsible, if he had previously defrauded the city by furnishing inferior supplies, even though he had not been judicially convicted of the act;¹ while in another case it was held that a city council could not arbitrarily refuse to entertain a bid for city printing because the bidder was not the owner of a newspaper.²

To be able to demand an award of the contract the lowest bidder may be required not only to offer adequate security for the performance of the contract, but he must also be able to undertake what is expected or demanded of him.³

148. There Must be No Collusion or Other Efforts to Prevent Competition.—The reasonableness of a requirement that the contractor shall not have had assistance or advice from employees or fiduciaries of the city or any department of public works, and that no one elected to office or holding

¹ *Douglass v. Commonwealth*, 103 Pa. Rep. 414. St. 559.

² *People v. Dorsheimer*, 55 How. Pr. (N. Y.) 118.

³ *Berry v. Tacoma* (Wash.), 40 Pac.

positions of trust and confidence should have any interest in the proposal or contract, are manifestly reasonable and just when such acts or interests by the parties mentioned are contrary to the express policy of the law and of good government.*

A statute prohibiting any councilman of a city from being interested in any contract with the city has been held to apply to a member of the council who is a stockholder and secretary of a corporation having a contract for lighting the city, even though the member was elected after the contract was executed.¹ A court of its own motion may institute a prosecution against a public officer for being concerned in a public contract by directing the grand jury to investigate the matter, and after a presentment by them directing the district attorney to submit an indictment.²

That bidders should be required to state the names of all parties interested in the bid, and that the bid is made without connection with any other bidder, and that it is in all respects fair and without collusion or fraud, cannot be questioned. It is a uniform doctrine that any combination at public or private sales having the effect of preventing competition in bidding is against the policy of the law and avoids the sale.³ The same doctrine applies to bidding for public work in response to invitations for tenders by which competition is sought. A combination of contractors for the purpose of destroying competition and securing to one a contract which the law requires should be awarded only after competition is against public policy and illegal, and if it results in unreasonable prices the proposal may be rejected or the contract repudiated or annulled.⁴

Any agreement between parties designing to make bids, tending either directly or indirectly to restrain or lessen rivalry and competition between them, is void as against public policy, even though it may not appear that such agreement did really produce any result detrimental to public interests.

This is true in auction sales, but it seems that the auctioneer or owner must have been a party to the collusion or deceit. The fact that a person by mistake believed himself employed to attend an auction sale as a "puffer," and by making fictitious bids induced one who was the highest bidder at the sale to bid more than he would otherwise have done, does not render the sale void as to the owner if the auctioneer and owner had no knowledge of such person's conduct.⁵ The fact that several of the highest bids made were not enforced by the owner does not entitle

¹ *Commonwealth v. De Camp* (Pa. Sup.), 35 Atl. Rep. 601.

² *Commonwealth v. Hurd* (Pa.), 35 Atl. Rep. 682.

³ *Durfee v. Moren*, 57 Mo. 374 [1874]; *Saxton v. Sieberling* (Ohio), 29 N. E. Rep. 179; and see *Locke v. Willingham* (Ga.),

25 S. E. Rep. 693; *Jennings Co. Com'r's v. Verbar*, 63 Ind. 107.

⁴ *People v. Stevens*, 71 N. Y. 527; *People v. Lord*, 6 Hun 390; *Woodworth v. Bennett*, 43 N. Y. 273; *Gulick v. Ward*, 10 N. J. Law 87.

⁵ *Locke v. Willingham* (Ga.), 25 S. E. Rep. 693.

* See Secs 42, 85, *supra*.

† See Sec. 82, Chap. 3, Part I., *supra*.

another highest bidder for a different lot offered at the same time to rescind his bid.¹

Agreements between two contractors, sending in distinct sealed proposals, that if the contract should be awarded to either, both should share equally in the profits, if any, or contribute equally for losses, has been held against public policy and void.² But agreements between bidders for a public improvement to become partners in doing the work if either of them secured the contract, and that any benefit should inure to the firm, have been held valid and binding when it did not appear that the intent, effect, or necessary tendency of the contract was to stifle fair competition.³*

An interesting case is where two contractors by previous agreement made a bid for their joint benefit, in the name of one of them and a third person, for the construction of certain city improvements, and the contract was awarded to them. One of them, with the other's knowledge and consent, had made a separate bid, at a much higher figure, which was not seriously intended. The city engineer's estimate was higher than the latter bid, and there were three other bids still higher. Under these circumstances it was held that, even if the second bid was put in for a fraudulent purpose, there was no room for the inference that it had any influence in the making of the award; and, as the attempted fraud was therefore unsuccessful, it could furnish no ground for refusing to compel one of the contractors to account to the other for his share of the profits made under the contract.⁴

A statute that provides that the contract shall "in all cases be let to the lowest responsible bidder" has been held not to permit the substitution of another person as contractor in place of the lowest bidder, and further that any contract based upon such a substitution is void. The lowest bidder was to have a bonus for the contract.⁵† If as a result of illegal combinations to prevent competition a contract is let at an unreasonable price, the party defrauded may repudiate the contract and recover damages.⁶

A secret contract, between persons proposing to bid on the construction of a public work, by which their bids are to be put in, apparently in competition, but really in concert, with the intention of securing as high a price as possible, and dividing the profits, will not be enforced, though one of the parties secured the contract, executed the same, and received the profits.⁷ A note given in part consideration of an agreement to refrain from bidding

¹ *Locke v. Willingham* (Ga.), 25 S. E. Rep. 693.

² *Atcheson v. Mallon*, 43 N. Y. 147; *Woodworth v. Bennett*, 43 N. Y. 274; *Hunter v. Pfeiffer*, 108 Ind. 197 [1885].

³ *Breslin v. Brown*, 24 Ohio St. 565; *McMullen v. Hoffman* (C. C.), 75 Fed. Rep. 547; *accord*, *Flanders v. Wood* (Tex.), 18 S. W. Rep. 572; *and see* *Whalen v.*

Brennan, 34 Neb. 129; *contra* *Atcheson v. Mallon*, 43 N. Y. 147.

⁴ *McMullen v. Hoffman* (C. C.), 75 Fed. Rep. 547.

⁵ *Hannah v. Fife*, 27 Mich. 172.

⁶ *People v. Lord*, 6 Hun (N. Y.) 390; *People v. Stevens*, 71 N. Y. 527.

⁷ *McMullen v. Hoffman* (C. C.), 69 Fed. Rep. 509, 75 Fed. Rep. 547.

* See Sec. 149, *infra*.

† See Sec. 15, *supra*.

at a public sale of goods is invalid except in hands of an innocent purchaser.¹

Any combination of contractors by which the privilege of bidding is secured by one without competition is illegal, though not criminal in Indiana, and if it results in letting the contract at unreasonable prices, the proposals may be rejected or the contract repudiated. A fraudulent bid renders the contract, with the bidder making, it null and void.² Any promise of reward to induce another contractor who had intended to bid *not to bid* renders the contract null and void.³ Any fraudulent practice, such as collusion between public officers and the contractor, will have the same effect.⁴ In Indiana such a combination among the contractors to make high bids and secure an exorbitant price for the work and to divide the profits has been held *not to be a crime*.⁵

148a. Possibility of the Law Being Used to Escape Onerous Contracts.—The position of a contractor undertaking public works is a precarious one indeed, when a slight omission of duty by the council or a neglect of duty on the part of a public officer may destroy his supposed rights in a construction contract, or prevent him absolutely from recovering for work done and materials furnished, no matter how conscientiously and skillfully performed. That a man's rights and compensation for an honest effort performed in good faith should depend upon the acts and misfeasance of another over whom he has no control, is a hardship which justice can never require. It may be the effect of a necessary law, but it is wholly wanting in equity.

It has been suggested that a strict application of the law might afford the contractor an avenue of escape from a burdensome undertaking, as when he has made a mistake in his estimate and proposal, or when the conditions are such that he desires to evade the performance of the contract. With the aid of some subordinate officer a fictitious case of collusion or some irregularity could be worked up which would render the award or contract void or illegal, and render it necessary to readvertise the work, to the relief and escape of the cunning contractor. From what has preceded it would not seem necessary to secure the assistance of a public officer, but fellow contractors might afford relief by exposing a fake combination to prevent competition in bidding. If such irregularities were made out and the lowest bidder was not shown to be a party, the city or state could not equitably retain his certified check nor hold his bondsman for his failure to enter into or to complete his contract. If the state or city refused to enter into the contract or was enjoined from so doing, the contractor could hardly be made to suffer in consequence. There are cases where conspiracies have been

¹ *Atlas National Bank v. Holm* (C. C. A.), 71 Fed. Rep. 489.

² 15 Amer. & Eng. Ency. Law 1100.

³ *Jennings County Comm'rs v. Verburg*, 63 Ind. 107; *Woodworth v. Bennett*, 43 N. Y. 278; *Gulick v. Ward*, 10 N. J. Law 87.

⁴ *Nelson v. New York*, 5 N. Y. Supp. 688, s. c. 29 N. E. Rep. 814; *In re D. & H. C. Co.*, 8 N. Y. Supp. 352; *In re Anderson*, 109 N. Y. 554.

⁵ *State v. Bruner* (Ind.), 35 N. E. Rep. 28.

formed to secure contracts, but the author has found none in which the object has been to get rid of them. In New York it has been decided that a contract secured by corrupt means was voidable only at the election of the city, one of the parties.¹

Some of the cases seem to have anticipated the possibility of such a conspiracy and evasion, as in those cases where the courts have held that the attempt to prevent competition must have been successful to avoid the contract, that to render the bid or contract void the result must have been a letting at an unreasonable price.² For a contractor to prove that the work had been let at an exorbitant price or that the public interests had suffered might not be an easy matter, especially when he himself was in a tight place on account of having bid too low.

149. What is Good Evidence of Fraud and Collusion of Public Officers and Servants.—An estimate of the quantity of work which was only a random guess, and made the amount of stone excavation at more than double and the earth excavation at less than one-half the actual amount, was held not an estimate that would form a basis for a valid contract; that such an estimate, taken in connection with a bid of more than five times the actual cost of excavation earthwork and less than one and one-half per cent. of the actual value of stone work, thus showing on its face, according to the engineer's estimate, that he was the lowest bidder, when he really was the highest bidder, raised a just inference of fraud and collusion.³* So it may be shown in proof of fraud that the bidder had offered to sell materials at prices lower than those stated in his bid.⁴

The facts that the bidder secured the contract as the lowest bidder by putting in an unbalanced bid; that the city officers, exercising the option given them by the contract, only called for those materials the price for which was in excess of the fair price, and in greatly increased quantities; and that the advertised estimated amount of some of such materials was greatly less than the amount actually needed at the time,—are sufficient to show fraud and collusion in the letting of the contract.⁵

Public officers having public works in hand are presumed to know the usual prices paid for work, and evidence that a higher price was agreed upon than was shown by the city bid-book to have been paid before and after the contract, for similar work, was held competent as bearing upon the alleged combination and collusion of the commissioners. Discretion and good judgment must be exercised, and such contract be fairly made, and at reasonable

¹ *Devlin v. New York* (Com. Pl.), 23 N. Y. Supp. 888.

² 15 Amer. & Eng. Ency. Law 1100.

³ *In re Anderson* (N. Y.), 17 N. E. Rep. 209 [1888]; but see *contra* in *Reilly v. The Mayor*, 111 N. Y. 473 [1889], s. c. 18

N. E. Rep. 623; and see *McMillen v. Hoffman* (C. C.), 75 Fed. Rep. 547.

⁴ *Nelson v. New York* (App.), 29 N. E. Rep. 814, affirming 5 N. Y. Supp. 668.

⁵ *Nelson v. New York*, *supra*.

* See Sec. 54, Chap. I., *supra*

prices, with due regard to the interests of those concerned, or a court of equity will relieve against them.¹

In general, contracts are not void as against a public officer if from the agreements it does not appear that their intent, effect, or necessary tendency is to stifle competition.² Therefore, a contract between several architects, who had each put in plans and specifications in competition for the erection of a public building, to retire from further contest and let the plans alone compete, and that whichever plan should be accepted all should share equally in the remuneration, is not against public policy, the competition not being in the least influenced by the agreement.³

Likewise when one of the parties who had filed his bid and another who was about to file his bid entered into an agreement to become partners in doing the work, in the event of either party being the successful bidder, both to share the profits alike, the agreement was held not against public policy, it not appearing that the intent, effect, or necessary tendency of the contract was to stifle competition.⁴

150. Oath as to Truthfulness of Statements.—It seems that bidders may be required to verify the statements made in their proposals under oath, and that when the bidder is a firm, each partner may be required to make oath to the truthfulness of the statements made.⁵

If a question be raised as to the truth of statements made in proposal, which on its face entitles the bidder to the contract, it has been held that a board of public officers could not decide the question against the bidder and award the contract to another without giving him an opportunity to be heard;⁶ † and in this case the board was clothed with discretionary powers providing that contracts should be awarded to the lowest bidder who furnished such security as the board approves, unless in the interests of the public the board determines to reject *all* bids.

MATTERS TO BE CONSIDERED IN PREPARING BIDS.

151. Forms to be Used and Formalities to be Observed.—

1. *Made in Triplicate.*

All bids must be made in triplicate upon the printed forms obtained at the office of the Engineer, No. Street, City of, County of, State of, and must be accompanied by a copy of the Advertisement, Instructions and Conditions, the Specifications, and Contract.

2. *Addressed and Indorsed.*

All proposals must be addressed to the..... Engineer, to his

¹ *Cook v. City of Racine*, 49 Wis. 243 [1880].

² *Whalen v. Brennan* (Neb.), 51 N. W. Rep. 759; *Breslin v. Brown*, 24 Ohio St. 565.

³ *Flanders v. Wood* (Tex.), 18 S. W. Rep. 572 [1892].

⁴ *Breslin v. Brown*, 24 Ohio St. 565; *accord Gulick v. Webb* (Neb.), 60 N. W. Rep. 13.

⁵ *People v. Croton Aqueduct*, 26 Barb. (N. Y.) 240.

⁶ *Connolly v. Board* (N. J.), 80 Atl. Rep. 548.

* See Sec. 148, *supra*.

† Compare Sec. 147, *supra*.

office, and indorsed "Proposals for the Construction [Building of], with the name [or number] of the person making the bid or proposal and the date of its presentation.

2^d. *Indorsement and Time of Delivery.*

The proposals must be delivered at the office of the Engineer, ... in a sealed envelope, addressed to, Engineer, ..., indorsed "Proposals for the Construction [Erection] of, etc., ..., at or before 12 o'clock, Monday, ... 18...

3. *No Bids Received after Date Named.*

Any and all bids received after the hour named [fixed] for delivering the proposals will not be opened or considered unless all of the bids then presented shall have been rejected and reconsidered.

4. *Prices to be Written Out.*

The prices must be written out as well as expressed in figures, in the respective columns provided for the same.

5. *Blank Forms Furnished must be Used.*

Bidders are required, in making their bids or estimates, to use the blanks prepared and furnished for that purpose by the Engineer, a copy of which, together with the forms for the Contract and Bond, including the Specifications and Plans, can be obtained upon application therefor at the office of the Engineer.

5^d. *Blank Forms.*

Each bidder must obtain blank forms of proposal, and prepare and submit his proposal thereon. The original drawings named in the specification will be retained on the files of the office of the Engineer (Architect), but tracings or copies of the same will be prepared for the use of the bidders.

6. *Proposals must be Confined to the Estimates.*

Proposals or estimates must contain neither more nor less than is called for in the advertisement or provided for in the blank form of proposal and the Specifications and Plans. Any bid which does not contain bids for all items for which bids are invited, or which contains bids for items for which bids are not asked, will be considered informal. No change shall be made in the terminology or phraseology of the proposal.

6^d. *Proposal must be Regular.*

Proposals that contain any omission, erasures, alterations, additions, or items not called for in the Specifications, Plans, and Bill of Quantities contained in the blank form of proposal, or that contain irregularities of any kind, may be rejected as informal.

6². *Alterations should be Explained if Alterations are Permitted.*

Alterations by erasures or interlineations should be explained or noted in the proposal over the signature (or number) of the Bidder.

7. *Unbalanced Bid not Acceptable.*

Any bid in which the prices stated for the several items are unbalanced may be rejected.

8. *Bids may not be Withdrawn nor Changed.*

Permission will not be given to withdraw, modify, or explain any proposal or bid after it has been deposited with the Engineer.

8^d. *Bids may be Withdrawn.*

If a bidder wishes to withdraw his proposal, he may do so after it has been delivered to the Engineer at any time before the time set for opening the proposals, without prejudice to himself.

9. Bidders Agree to Forms Furnished.

Parties making bids are understood to accept the terms and conditions contained and expressed in the forms of Contract, Specifications, Plans, etc., annexed to the proposal submitted.

10. Forms must be Kept Intact.

No bid will be received if detached from the other forms with which it is bound; the entire package must be delivered unbroken and in good order, complete in all respects.

11. Drawings must be Returned.

Parties obtaining copies of the Plans and other drawings must return them to the Engineer within... days from the date of receipt.

12. Estimate of Quantities.

The following is a statement, based upon the estimates of the Engineer, of the quantity, quality, nature, and extent, as nearly as possible, of the work and materials required, and the several bids will be tested and compared by the quantities given in this estimate:

	PRICE
3,000 cubic yards Rock Excavation....	\$.....
5,000 " " Earth "	\$.....
4,000 " " Filling.....	\$.....
1,000 " " Rubble Masonry.....	\$.....
500 " " Concrete.....	\$.....
800 square yards Paving to be furnished and laid	\$.....
1,000 linear feet of Curb and Guttering.....	\$.....
10,000 feet, board measure, Pine Lumber.....	\$.....
1,800 pounds Wrought Iron.....	\$.....
etc. etc. etc. etc.	

12'. Estimate of Quantities.

The bids will be compared on the basis of the Engineer's estimate of the quantities of work to be done and the materials to be furnished, which are as follows:

Item [a]. 10,000 feet B. M. Pine.

Item [b]. 20,000 Paving Bricks.

etc. etc. etc.

13. Estimate is Approximate.*

The above-mentioned quantities, though stated with as much accuracy as is possible in advance, are approximate only, and bidders are required to submit their estimates upon the following express conditions which shall apply to and become a part of every estimate received:—

a. Bidders must determine quantities for themselves.

b. Bidders must satisfy themselves by personal examination of the location of the proposed works, and by such other means as they may prefer, as to the accuracy of the foregoing estimates of the Engineer and the nature and extent of the work to be performed according to the Specifications and Plans, and shall not at any time after the submission of his proposal dispute or complain of such statement or estimate of the Engineer, nor assert that there was any misunderstanding in regard to the work to be done or the materials to be furnished.

c. Bidders should make an inspection and estimate.

13'. Contractor should Make Personal Examination.

Before submitting a proposal each bidder should make a careful

examination of the drawings and specifications, and fully inform himself as to the quality of the materials and character of the workmanship required, and he should visit the locality where the work is to be done and make a careful examination of the place where the materials are to be delivered, for should his proposal be accepted he will be responsible for any and every error in his proposal resulting from his failure to do so.

13^d. *Estimate is Correct.*

The quantities given above are correct, and are the quantities that will be used in the final estimate. The prices bid must include all items of expense attending the work as herein specified.

14. *Work and Materials are Itemized. Bid is for Whole Work.*

In the form of proposal the materials to be furnished and the work to be done are itemized for the purpose of comparing the bids and as a basis for the monthly estimates, but if the contract be awarded it will be as a whole.

15. *Itemized Bid Required.*

Bidders must state the proposed price for each separate item of the work by which, together with the time required to complete the work, the bids will be compared; but each bid must cover the entire work, and no partial bids will be received.

16. *Nothing Allowed for Work not Mentioned.*

Work or materials not specified, and for which a price is not named in the contract, will not be allowed for nor considered.

17. *Quantities may be Increased or Diminished.*

It must be understood that these quantities are given merely as a basis for comparison of bids, and the right is expressly reserved to increase or diminish the quantities or altogether omit any items that in the judgment of the Engineer may be deemed unnecessary.

18. *No Claims for Damages or Extra Work.*

Such additions or omissions do not entitle the contractor to any claim for extra work in the completion of the work, or to any other claims for damages, if the quantities of work and materials should prove to be greater or less than estimated.

18^a. *Additions and Changes to be at Contract Prices. No Extra Claims.*

It must, therefore, be expressly agreed that the Engineer may, in his discretion, and either before or after the commencement of the work, increase or diminish the quantities to an extent not exceeding thirty [30] per cent. thereof. If the quantities be increased, the increase shall be paid for, but only for the actual amount thereof, and at the price fixed in the contract; and if the quantities be diminished, such diminution shall not in any case constitute a claim for damages or anticipated profits on the quantity or quantities so dispensed with, but only the quantities actually delivered and accepted and the work done and approved, will be paid for.

18^b. *Engineer may make Additions, Omissions, and Alterations at Market Price.*

The successful bidder must understand that the right and privilege is reserved to the Engineer to make any additions to, omissions from, changes or alterations in the materials and work called for by the drawings and specifications and contemplated by or embraced in his proposal; and that any addition to, or omission from, said materials or work is to be made on the basis of the contract unit value of the work or materials referred to; and that any changes in the quality of

the materials or alterations in the work are to be made on a basis of market rates prevailing at the time that such changes or alterations are ordered; and further, that no claim for compensation for any extra materials or work shall be made or allowed without the same has first been agreed upon and specifically authorized in writing by the Engineer, under the approval of the owner, commissioner, etc.

19. *Samples to be Submitted.*

Each bidder must submit with his proposal, at his own expense, samples of the materials and workmanship [finish] which he proposes to use [furnish], the samples to have the name of the bidder, the title and location of the work, and the date of the proposal, plainly marked thereon. Each sample of stone.....must be....inches by....inches by....inches, one face showing natural fracture, and the other faces showing different styles of finish, with the location of its quarry distinctly marked upon it. The samples submitted with the proposal of the successful bidder will be retained, and when required he must at his own expense furnish duplicates of the samples.

20. *Quality of Materials to be Considered.*

The character of the materials proposed will be considered, and if it be deemed to the interests of the city, state, or company, or owner for this or any other reason to accept any proposal other than the lowest, the right to do so is expressly reserved.

20'. *Materials Offered and Time required to Complete will be Considered.*

Each bidder may understand that the quality of the materials offered and the time stated for the supply of the materials and the completion of the work will be considered in the matter of acceptance of the proposal. The value of a day in estimating the time required for performance will be \$....

21. *Materials furnished by City, State, or Owner.*

The following-named materials [and labor] will be furnished to the bidder by the city, state, or owner at the prices given in the blank form of proposal or bill of quantities, the same to be included in the bidder's estimate and proposal.

22. *Patent Rights.*

Each bidder must understand that he is to protect and indemnify all persons acting for and in behalf of the city, state, or owner for any liability which may be claimed by any party on account of any patent rights connected with any of the materials, articles, or processes used or employed in the work or in its performance, or any contemplated or embraced in his proposal.

23. *Bid for a Part or the Whole.*

Bidders are requested to state whether their bids must be considered as a whole or whether a part thereof may be accepted.

24. *Tenders.*

Tenders are to be made in the form of a lump sum, which sum must be taken to cover the cost of the completion of the work in every respect, in accordance with the specifications and drawings.

FORMALITIES TO BE OBSERVED.

152. Propriety of Certain Requirements and Restrictions.—Any restriction or requirement imposed upon a bidder which will facilitate the business of letting the contract and secure uniformity and a standard for comparison

of the bids, and not entail too much work or expense upon the contractor, can without doubt be considered reasonable, and within the discretion accorded to public officers by our courts. Such requirements are those which insist that proposals shall be made upon printed forms in triplicate and shall be delivered by a certain day named, and that the prices shall be written out as well as expressed by figures to give greater certainty and to guard against mistakes, and many other similar requirements. The act of the board in directing the city engineer to reject bids for public improvement unless accompanied by an offer to purchase bonds has been held not a ground for attacking a contract actually made, it not appearing that the bids were influenced by that fact.¹

153. There should Be a Standard for Comparison of Bids.—In order to have a fair and equitable comparison, it is essential that all should have the same data concerning the same subject-matter, and that the bidders one and all be furnished with the same information or be afforded the same means of acquiring it.

An act or a charter which requires a contract "to be given to the lowest responsible bidder" has therefore been held to render illegal and void a contract awarded on plans and specifications prepared by each of the different bidders. The court says the term lowest bid necessarily implies a common standard by which to measure the respective bids, and that a common standard must necessarily have been previously prepared of the work to be done.² Such a letting not only prevents the competition which it is the object of the statute to secure, but furnishes no standard by which the board can determine the lowest bid, and gives an opportunity for favoritism in awarding the contract.³

154. Full Information as to the Work should Be Furnished.—A provision that certain contracts shall be let to the lowest responsible bidder after advertising for bids requires that information shall be given to bidders which will enable them to bid intelligently.⁴ They should be informed either by the notice of letting or by proper specifications of the amount of work embraced in each contract, the time within which it is to be completed, the manner in which it is to be done, and the quality of the materials to be furnished.⁵

It is the manifest duty of the contracting officer or board which is authorized to make such public improvements to prepare plans and specifications, and to give a detailed statement or estimate of the work and of the

¹ *Rice v. Board of Trustees* (Cal.), 40 Pac. Rep. 551.

² *Urazet v. Pittsburgh* (Pa.), 20 Atl. Rep. 693 [1890]; but see *State v. St. Bernard* (Ohio), 10 Ohio Cir. Ct. Rep. 74; and *Connersville v. Merrill* (Ind. App.), 42 N. E. Rep. 1112.

³ *Ertle v. Leary* (Cal.), 46 Pac. Rep. 1.

⁴ *Detroit v. Hosmer* (Mich.), 44 N. W.

Rep. 622 [1890]; and see *Kneeland v. Hosmer*, 20 Wis. 437.

⁵ *Kneeland v. Furlong*, 20 Wis. 437; see *Peoples v. Byrd* (Ga.), 25 S. E. Rep. 677; and see *Otis v. City of Chicago* (Ill. Sup.), 43 N. E. Rep. 715; *semble*, *Guaranty & T. Co. v. Chicago* (Ill. Sup.), 44 N. E. Rep. 832 [1896].

kinds and quality of the materials required, for the purpose of affording bidders data from which to estimate the cost of the undertaking and to induce fair and honest competition.¹ It has been held that the bidder cannot be required to furnish his own plans.² The notice must provide for plans and specifications.³

Such provisions in a city charter or special enactment, that contracts for public works shall be let to the lowest responsible bidder after advertising for bids, require that such information be given as will enable the bidder to bid intelligently, and that the same requirements, estimates, and specifications be given each and all the bidders, and that they shall bid upon the same work and materials and under the same specifications.⁴ Such estimates and specifications must be definite as to quantity as well as to quality of materials required, or the contract will be void.⁵ They should be rendered upon a cash basis.⁶ Under a charter requiring ordinances for public work to specify the materials to be used, an ordinance is void if it fails to specify the material,⁷ but the notice need not specify that an asphaltum pavement proposed is to be of a certain kind of asphaltum.⁸ When the statute requires that the nature, character, locality, and a description of the improvement proposed shall be set forth, an ordinance providing for the paving of a street or the construction of a brick sewer "with necessary manholes" is not defective because it fails to specify the location of the manholes and catch-basins.⁹ The exact amount of paving composition required per square yard need not be specified.¹⁰ An act that requires the advertisement to "specify briefly the locality to which it is limited, and the time in which it must be completed," does not render it necessary to give the dimensions of the improvement nor the materials of which it is to be built.¹¹

155. The Bid Should Contain neither More nor Less than is Called for by the Instructions, Plans, and Specifications.—The standard adopted, the necessity of requiring bidders to conform to it, and to include neither more nor less, is at once apparent. The addition of one single item, such as a different kind of stone, brick, or timber, a different quality of work, or a longer or better guaranty, destroys the equality and renders the bid worthless for comparison with the others which conform to the standard.¹² It

¹ *McBrien v. Grand Rapids*, 56 Mich. 95; and see *N. P. Perrine Co. v. Pasadena* (Cal.), 47 Pac. Rep. 777.

² *People v. Com'rs*, 4 Neb. 150.

³ *Wilkins v. Detroit*, 46 Mich. 120.

⁴ *City of Detroit v. Hosmer* (Mich.), 44 N. W. Rep. 622.

⁵ *Bigler v. New York*, 5 Abb. N. Cas. (N. Y.) 51; *Reilly v. New York*, 54 N. Y. Super. Ct. 463.

⁶ *Kansas Town Co. v. Argentine* (Kans. App.), 47 Pac. Rep. 542 [1897].

⁷ *Verdin v. St. Louis* (Mo. Sup.), 27 S. W. Rep. 447.

⁸ *Verdin v. St. Louis* (Mo. Sup.), 27 S. W. Rep. 447; *Otis v. Chicago* (Ill.), 43 N. E. Rep. 715.

⁹ *City of Springfield v. Mathus*, 124 Ill. 88 [1888]; *Vane v. City of Evanston* (Ill. Sup.), 37 N. E. Rep. 901; *Cochran v. Hyde Park* (Ill.), 27 N. E. Rep. 939 [1891].

¹⁰ *Wood v. Chicago* (Ill.), 26 N. E. Rep. 608.

¹¹ *Main v. City of Fort Smith* (Ark.), 55 S. W. R. 801 [1887]; and see *Felker v. New Whatcom* (Wash.), 47 Pac. Rep. 505 [1897].

¹² *Weed v. Beach*, 56 How. Pr. (N. Y.) 470.

cannot benefit a contractor or builder to include in his proposal other or more or better labor and materials than are specified in the advertisement. Under an act or charter requiring the work to be advertised, proposals received, and the contract to be given to the lowest bidder, the bid can be regarded only as a proposal for the labor and materials so advertised for, and if the price is not lower than that of any other bidder whose proposal embraces only the labor and materials called for in the advertisement, he is not entitled to have the contract awarded to him.¹

Bids submitted according to certain specifications which contain a warranty of durability for six years cannot be compared with a bid that contains a warranty for more than six years. If the additional warranty were considered and influenced the award to one who was not the lowest bidder, the contract will be void.² When bids were asked for a storage reservoir capable of holding a water-supply for 100 days' delivery at the rate of 50,000,000 gallons per diem, the contract was not lawfully awarded to a bidder solely because of his having offered to provide a storage capacity sufficient for 250 days.³ The same was held of a case where a contract was awarded to one who was not the lowest bidder, but who had furnished specimens which were not called for in the notice asking for bids, the contract having been given to him because of the greater fitness for use as shown by the samples. The contract was declared void, as contrary to the charter.⁴ Samples or specimens furnished cannot be compared, and the lowest price then determined by reference to the comparative fitness of the specimens, unless the advertisement has asked for samples and proposals to do work according to such samples, so that all should bid with the same understanding.⁵ When samples of materials which the bidder will use have been furnished as required by the instructions to bidders, and the sample of the lowest bidder is not acceptable to the engineer as provided in the contract, he cannot demand the award of the contract, nor can it be given to him, even though he does offer to use brick of another kind which comes up to the requirements of the specifications.⁶

While the acts and requirements of a board of public works are subject to review by the courts, yet, the acts being discretionary, the courts do not interfere unless the motive be fraudulent or does positive injury. They tolerate restrictions and requirements for which they can assign no just cause, and that are frequently burdensome to bidders.⁷*

¹ *Boren v. Com'rs of Darke Co.*, 21 Ohio St. 311 [1871]; but see *Weed v. Beach*, 56 How. Pr. (N. Y.) 470, where it was held that when state officers had made an effort to obtain bids in a certain form and had failed in the attempt, that they might, as against such faulty bidders, examine all the bids, and according to their best judgment award the contract to the lowest [regular] bidder.

² *State v. City of Trenton*, 49 N. J. Law 339.

³ *Van Reipen v. City of Jersey City* (N. J. Sup.), 33 Atl. Rep. 740.

⁴ *State v. City of Trenton*, *supra*.

⁵ *Shaw v. Trenton*, 49 N. J. Law 339 [1887].

⁶ *Hermann v. State*, 11 Ohio Cir. Ct. Rep. 503.

⁷ *Semble, Re Marsh*, 83 N. Y. 431.

* See Sec. 146, *supra*.

When the bid is accepted the bidder is bound only by the specification shown him at the time he makes his bid.¹ If other specifications are shown him when he executes the contract and he agrees thereto, they become a part of the contract and he is bound by them.² Statements or explanations by members of the board or its clerk will not be accepted in contradiction to the terms of the formal invitation to bidders. Clerks, engineers, and individuals have no power to vary the terms of the advertisement nor to volunteer additional information not given to all bidders. If a contractor acts upon representations by such unauthorized persons, it seems he does it at his peril, and must take the consequences.³

156. Contract Must be Strictly According to Terms of Advertisement, Plans, and Specifications by which Bids were Invited.—It is obligatory upon the officers of a city or state to execute the contract strictly in accordance with the terms and specifications by which the bids were made.⁴ The letting of a contract containing provisions materially more favorable to the contractor than the requirements under which the bids were invited and received destroys the benefit of the competition intended to be realized by the statute. Such contracts are illegal, and their performance may be enjoined.⁵ Neither the quantity nor quality of the work or materials nor the conditions prescribed can be changed, nor new burdens imposed, nor any alterations made, nor any new undertakings or pledges of the contractor be considered in awarding the contract.⁶ So when the instructions require that the price paid for earth excavation should be one fourth that bid for rock excavation, it was held not improper and that a bid which named \$1.77½ for rock and 44½ cents for earth might be rejected for not conforming to the specifications, the price for earth works not being precisely one fourth that of rock excavations.⁷

The making of a contract to pave a street 37 feet wide, when the bids were received for a street 42 feet wide, omitting a space of five feet between the rails of a street-car track which it was the duty of the car company to keep in repair, was held not such an irregularity as would warrant the setting aside the assessments in view of the fact that the specifications did include the space between the rails, and that the cost thereof was not included in the assessment, and there was no showing of injury resulting to property-owners.⁸

157. When Amount of Work Cannot be Determined.—When plans and specifications have been made and estimates prepared of the amount and

¹ *Hobbs v. Texas, etc., R. Co.* (Ark.), 55 S. W. Rep. 586 [1887]; *Hughes v. Clyde*, 41 Ohio St. 339.

² *Elgin v. Joslyn* (Ill.), 26 N. E. Rep. 1090 [1891]; see also 108 Ill. 323, and 118 Ill. 567.

³ *Langley v. Harmon* (Mich.), 56 N. W. Rep. 761; *Little v. Jayne* (Ill.), 16 N. E. Rep. 374 [1888].

⁴ *Smith v. Mayor*, 10 N. Y. 504.

⁵ *Wickwire v. City of Elkhart* (Ind. Sup.), 43 N. E. Rep. 216.

⁶ *Nash v. St. Paul*, 11 Minn. 174; *People v. Board of Improvement*, 43 N. Y. 227; *Nichols v. State* (Tex.), 32 S. W. Rep. 452.

⁷ *Matter of Petition of March*, 83 N. Y. 435 [1881].

⁸ *Voght v. Buffalo* (N. Y. App.), 31 N. E. Rep. 340, reversing 14 N. Y. Supp. 759.

kind of work and materials required, it becomes a comparatively easy matter to get bids upon the same basis; but when the quantity and character of the work cannot be determined, the standard of comparison must be an approximate one. In such cases it is not only prudent but necessary to so describe the work that a comparison can be made of the several proposals without knowing the aggregate and exact cost of the whole work. This is usually accomplished by inviting bidders to name prices per unit of measure, the quantities being given approximately only, to enable the contractor to determine at what price he will undertake a job of the same size estimated. In such cases it is customary and prudent to insert a statement that the quantities named are approximate only, and that the contractor must be his own judge as to the correctness of the estimate given, both as to quantity and kind.*

Every important item contemplated in the work must be included in the advertisement and specifications under which tenders were made. A part of the work may not be given outright to one person or party, nor can a price be fixed for a considerable part of the work and the remainder be given for competition. A contract which *fixed the expense of part of the work by agreement* between the contractor and the commissioner of public works, and not by competitive bidding, as required by law, is void as to such part.¹ A price cannot be fixed for rock excavation in an advertisement for proposals for constructing a sewer, because it is in violation of the charter of the city which requires contracts for work and supplies to be founded on sealed proposals and given to the lowest bidder.²

It is a violation of the law for public officers to test the bids by a comparison which omits a substantial part of the work to be contracted for. A contract awarded upon a comparison of bids which omitted an estimate of the rock excavation anticipated to be met was, therefore, held illegal and void.³

It has been held that the ratio of the price of rock excavation to that of earth excavation might be fixed as four to one.⁴ A minimum price to be paid for labor cannot be fixed, and a contract awarded upon the basis of such a specification is in violation of the statutory provision requiring work to be awarded to the lowest bidder.⁵

Extra work that has not been mentioned in the announcement of the work and prices named in the proposals cannot be ordered unless excepted by the statute or especially provided for in the charter. Thus an acceptance of a bid to do rock excavation and other work which omitted the consideration of rock excavation, and undertook to pay what the rock

¹ Mutual Life Ins. Co. v. New York (N. Y. App.), 39 N. E. Rep. 386.

² Merriam on Petition, 84 N. Y. 596 [1881]; see also Village of Hyde Park v. Carton, 132 Ill. 100; Lake Shore R. Co. v.

City (Ill.), 33 N. E. Rep. 602; *Re Mahan*, 20 Hun (N. Y.) 301.

³ Brady v. Mayor, 20 N. Y. 312 [1859].

⁴ *Re Marsh*, 83 N. Y. 435 [1881].

⁵ Frame v. Felix (Pa.), 31 Atl. Rep. 375.

* See Sec. 151, art. 13, *supra*.

excavation was reasonably worth as extra work, was declared against the policy of the law.¹ Under a contract by a city which provided that the architect might direct deviations and the increased cost be added to the agreed price it was held that the city was not bound by the architect's promise and order for piling, necessary for securing a firm foundation, because it had not been advertised and mentioned in the specifications for the work and proposals received for its construction.²

The contract as drawn and executed must not include extra work, nor contain other or different classifications than those competed under and included in the proposals.³ The prices must not be changed when the contract is given from those named in the bid, nor provisions made for extra work, as an allowance of 15 per cent. additional to the actual cost, when no such provision has been put in the notice for proposals. If such acts are committed, they may render the contract void and leave the contractor without any recovery for the work he has done. "For," says the court, "though this principle of the law may work hardships, yet it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which by improper combinations or collusions might be turned to the detriment or injury of the public."⁴

It does not matter that the bid is the lowest, or that it is less than the amount appropriated specially for the work; the difference between the sum bid and the amount appropriated cannot be recovered, as such additional contract is not binding on the state, because not let in the manner provided by law.⁵ However, it has been held in New York State that when the appropriation for a public work is limited, and a contract is made for it according to a plan to be adopted, and with a proviso that the cost shall be limited to a certain sum, if the price agreed upon is within that amount it is a valid contract, even though it reserves authority to make such changes of detail as may be necessary, and authorizes the engineer directing the work to determine the price of the extra work required.⁶

Any property-owner or taxpayer may maintain a suit to enjoin the prosecution of work under an illegal contract or the payment of the prices specified, even though it be conceded that the suit is brought in lieu of a suit by an unsuccessful bidder.⁷

Extras cannot be ordered, for if that were allowed the statute would be no safeguard to the public interests. The contract might include but a

¹ *McBrien v. Grand Rapids*, 56 Mich. 93 [1885]; *Brady v. Mayor*, 20 N. Y. 313 [1859].

² *Stuart v. Cambridge*, 125 Mass. 102; *Littler v. Jayne* (Ill.), 16 N. E. Rep. 374 [1888]; *but see Fleming v. Suspension Bridge*, 92 N. Y. 368 [1883].

³ *Tulloch v. Webster County* (Neb.), 64 N. W. Rep. 705.

⁴ *Dickinson v. City of Poughkeepsie*, 75 N. Y. 65 [1878]; *and see also* 11 Minn. 174.

93 U. S. 347-357, 96 U. S. 691, 2 Clifford 590; *Texas Transp. Co. v. Boyd*, 2 S. W. Rep. 364.

⁵ *Nichols v. State* (Tex.), 32 S. W. Rep. 452.

⁶ *Kingsley v. Brooklyn*, 78 N. Y. 300 [1879].

⁷ *Moynehan v. Birkett*, 31 N. Y. Supp. 983; *Maret v. Pittsburgh* (Pa.), 20 Atl. Rep. 693 [1890].

part of the work, while a larger and more profit-paying part could be ordered as extras.¹ Thus under a contract awarded by a village to the lowest bidder to do flagging, paving, and curbing, the village having undertaken to do the necessary grading and to furnish the sand and gravel, it was held that the contractor could not recover for the sand and gravel he had furnished in obedience to a resolution by the trustees of the village requiring him to do so, as the resolution was in violation of the city charter, which required that sealed proposals for work should be advertised for and the contract awarded to the lowest bidder.² It has been held that where a contract was let for the laying of Nicholson pavement (patented) and ordinary stone cross-walks, after proposals for Nicholson pavement only the assessment for the work could be vacated.³ Yet in another case it was held that where a contractor did work necessary to carry out his contract, either as extra work or to meet exigencies unforeseen when the contract was made, he was entitled to recover therefor on a *quantum meruit*, though the city charter provide that if any work shall involve an expenditure exceeding seventy-five dollars it shall be done by contract let to the lowest bidder.⁴

The contract must be confined to the work and materials contained in the proposals. Nothing can be added or omitted without due notice having been given, as the object of the law is to secure competition and the benefits to be derived from it. The contract must be the same that was advertised.⁵ A change by public officers of a foot in the depth to be dug for curbing, and permission to the contractor to appropriate stone that was by the specifications to be used for filling in a certain place, he furnishing earth which could be used on the street, are unauthorized and void. The proposals made by the contractor and the specifications form the only basis of a contract, and no contract can be made under any other terms.

If the contractor execute work not in strict conformity to such specifications and proposals, he is entitled to no compensation for his work, for there is no contract, and none can be implied.⁶ A recent case has even decided that where, after letting the contract for grading a street according to plans and estimates, an ordinance was passed changing the grade, but no new plan or contract was made, though the grading was done in accordance with the last established grade, an assessment for such work was invalid.⁷ A change in the lines or levels which lessens the amount and the cost of the work may render the contract inoperative, and invalidates the assessment.⁸ A board of

¹ *McBrien v. Grand Rapids*, 56 Mich. 95.
² *Parr v. Village of Greenbush*, 11 New York 246; and see also 76 N. Y. 463; but see *Bryson v. Johnson Co.* (Mo.), 13 S. W. Rep. 239; *McBrien v. Grand Rapids*, 56 Mich. 95 [1885], and other cases reviewed therein.

³ *Re Eager*, 46 N. Y. 100.

⁴ *Abells v. City of Syracuse* (Sup.), 40 N. Y. Supp. 233.

⁵ *Nash v. St. Paul*, 11 Minn. 174.

⁶ *Bonesteel v. The Mayor*, 22 N. J. 163 [1860]; but see *Barkley v. Oregon City* (Or.), 33 Pac. Rep. 978.

⁷ *City of Argentine v. Simmons* (Kan.), 37 Pac. Rep. 14; *Argentine v. Daggett*, 37 Pac. Rep. 14; *semble Hague v. Philadelphia*, 48 Pa. St. 527 [1865]; but see *Fuller v. Grand Rapids* (Mich.), 63 N. W. Rep. 530.

⁸ *Warren v. Chandos* (Cal.), 47 Pac. Rep. 132.

public works has no authority to exact from the contractor a bond that the pavement will last for five years where it is not required by the resolution of intention.¹ If, as is sometimes the case, the charter of the city provides that repairs shall be paid for by the city, and improvements by the property-owners benefited, the same to be let to lowest bidder; an ordinance, advertisement, and letting of a contract for the construction and maintenance (or repair) of a street together and to be paid for by either party alone, is void, being in violation of the charter.²

158. Right to Make Changes and Alterations Reserved.—Whether public officers can reserve the right to make changes and alterations in the specifications by giving notice of such reservation in the advertisement for proposals may well be doubted. Certainly not if the work were for a lump sum, nor under any circumstances which might foster favoritism or lessen the obligations or work which the contractor had assumed. Labor and materials paid for by the unit of measurements must be subject to such changes, and it can work no hardships to the public nor to the contractor. Even when it is provided in the contract that the contractor shall make any alterations in the form, dimensions, or materials when directed by the board of public works; that the work shall be prosecuted in such order and at such places as the board of public works may direct; that the excavations be made to depths shown on profile and plans on file, of such widths and in such directions as may be necessary; that any work required to be done that is not specified shall be done in accordance with the directions of such board, it is held that the board was not authorized to order any material change in the plan as to location or course of a sewer (which was being done at a price per linear foot), without the approval of the city council.³ If in the construction of works it is anticipated that difficulties, requiring changes, will be encountered, or that the work may become much more burdensome, as by the meeting of quicksand, hard-pan, or rock excavation, which would largely increase the cost, and the extent of which it may be impossible to ascertain in advance; such contingencies should be mentioned in preparing the specifications and contracts, and their payment be provided for, so that they may be taken into account by bidders in making their proposals by the cubic yard, linear foot, unit weight, etc.⁴

159. Instances Where Contract has been Sustained.—The fact that plans for street improvement were in the alternative is immaterial in the absence of proof that any one was misled or prevented from bidding, or that the cost of the work done was enhanced thereby.⁵

Such contracts are divisible. When a contract has been let for work, a

¹ *McAllister v. City of Tacoma* (Wash.), 37 Pac. Rep. 447.

² *Verdin v. St. Louis* (Mo.), 33 S. W. Rep. 480; and see *Santa Cruz R. P. Co. v. Broderick* (Cal.), 45 Pac. Rep. 863; and *Cole v. People* (Ill.), 43 N. E. Rep. 607.

³ *Compau v. Detroit* (Mich.), 64 N. W.

Rep. 336.

⁴ *McBrien v. Grand Rapids*, 56 Mich. 95; *Insley v. Shepard*, 31 Fed. Rep. 869 [1887]; accord *Kingsley v. Brooklyn*, 78 N. Y. 200 [1879].

⁵ *Gilmore v. City of Utica* (N. Y. App.), 29 N. E. Rep. 841, affirming 15 N. Y. Supp. 274.

part of which has been legally authorized and contracted for, and another part of which is illegal and unauthorized, the contractor may recover for that which was done in pursuance of the charter and according to law.¹ When a contract is in violation of the charter of a city as to a part of the work, it will render the assessment for the work so far void, as the work done was contrary to the provisions of the charter, and will not furnish a ground for vacating the whole assessment.² It may be reduced by the amount which it may have been increased by reason of fraud or substantial error or irregularity.³

160. Works Whose Cost Exceeds a Certain Amount Within the Statute, Charter, or Ordinance.—The question often comes up as to whether the statute or charter requires all work, however insignificant, to be included in the specifications and contract, and if it includes alterations and additions and extras from whatever cause. The delay and annoyance resulting from such a requirement would be expensive and aggravating beyond measure if it were necessary to advertise and wait for proposals for every small extra item or minor change required on or in works. This trouble is usually obviated by a clause in the act or charter that only such contracts for materials and work whose cost is more than a specified sum, *e. g.*, \$500, shall be advertised and let to the lowest bidder.⁴

The addition of such a clause, if the sum is made large, enables public officers to let work in parts and to evade the law, thus defeating its very object. Courts are alive to this fact, and seek to require the most scrupulous care and strictest honesty of all parties. Evidence of dishonest practices will be construed against the contractor and in favor of the public.

When a certain amount is specified as the limiting cost of work that may be let without advertising for proposals, it must not be exceeded. Under an act requiring "any expenditure of more than \$2500, to be let to the lowest bidder after advertising for bids," an informal contract for work and materials, including eight bronze statues, to cost more than \$2500, without advertising for bids, was declared void; and it was held that they could not be included under an advertisement and specification "for the iron inner dome and other ornamental ironwork," nor did verbal explanations made at the time the proposal was made remedy the omission of them.⁵

When proposals have been made to furnish labor and materials for a structure according to a schedule of prices for specific qualities, and a contract was subsequently entered into, to erect the structure for a certain sum of money, "being the aggregate cost at the prices specified in the said proposals," it was held that the statement of the cost was intended only as an

¹ *Texas Transp. Co. v. Boyd*, 2 S. W. Rep. 364 [1886]; see also *In re McCormick*, 60 Barb. 128 [1870], not fatal to the assessment.

² *Merriam in Petition*, 84 N. Y. 596 [1881].

³ *In re Anderson*, 17 N. E. Rep. 209 (N. Y. 1888); *In re McCormack*, 60 Barb. 128 [1870].

⁴ It may be doubted if \$500 is an appropriate sum. See *Littler v. Jayne* (Ill.), 16 N. E. Rep. 374 [1888], where the act was amended, making the sum \$2500 instead of \$500, which seems an opposite extreme.

⁵ *Littler v. Jayne* (Ill.), 16 N. E. Rep. 374 [1888].

estimate, and that the intention was to pay the prices named for such materials and labor as were actually furnished.¹

161. What Work Comes Within the Statute.—A charter of a city that requires that "all contracts for doing work and furnishing materials for an improvement shall be given to the lowest bidder" was held *not* to apply to a contract to furnish hose to the fire department;² but a contrary construction was put upon the same charter the following year, when it was held that a charter that required that all contracts should be awarded to the lowest bidder did include a contract to purchase fire-hose, and that an award of a contract contrary to the charter, and including additional qualifications not included in the estimate and specifications advertised, was void.³ The work of cleaning streets of a city, and of supplying it with water, have been held to come within the prohibitions of the charter against making contracts for work without previously advertising for proposals.⁴ A statute which requires all contracts for the improvement of roads to be let to lowest bidder has been held to include contracts for repairs to permanent bridges and culverts,⁵ and cells of a jail have been held to be a part of a public building.⁶

The removal of garbage at \$800 per month was held not to be within a statute requiring "that work necessary to be done to complete a particular job and involving more than \$1000" should be let to the lowest bidder, as the work in question was not done to complete a particular job and did not necessarily involve an expenditure of \$1000 or more.⁷ If it be provided that no contract or purchase involving an expenditure of more than \$1000 shall be made without first advertising for bids, an exchange, without advertising for bids, of pumping-engines incurring an expenditure of more than \$10,000 will not bind the city, even though it is made by order of the city council authorizing the board to make such an exchange, such order being held not to abrogate the terms of the ordinance.⁸ So under a contract for the construction of a public building a substitution of another kind of work which increases the amount to be paid for the building by more than \$1000 cannot be made.⁹ The cost of the materials substituted, it seems, is not to be added to the cost of furnishings whose place they take.¹⁰ Verbal explanations that certain work will be required and certain materials must be furnished are not sufficient to include items not mentioned in the advertisement or specifications, though they be a part of, or properly belong to, the structure advertised. They cannot be included if their cost exceed the statutory limit.¹¹

¹ *Swift v. New York*, 26 Hun (N. Y.) 508, reversed by *Court of Appeals* 89 N. Y. 52.

² *City of Trenton v. Shaw* (N. J.), 10 Atl. Rep. 243 [1887].

³ *State v. City of Trenton* (N. J.), 12 Atl. Rep. 902 [1888].

⁴ *State v. Kern*, 51 N. J. Law 259 [1889].
Water v. Davenport v. Kleinschmidt, 13 Pac. Rep. 249. *Water v. Frame v. Felix* (Pa.), 31 Atl. Rep. 375.

⁵ *Follmer v. Commissioners*, 6 Neb. 204.

⁶ *Ertle v. Leary* (Cal.), 46 Pac. Rep. 1.

⁷ *Swift v. Mayor*, 83 N. Y. 528.

⁸ *Worthington v. Boston* (Mass.), 41 Fed. Rep. 23 [1890].

⁹ *Brady v. New York*, 55 N. Y. Super. Ct. 45; and see *Sadler v. Eureka Co. Comm'rs.*, 15 Nev. 39; and *Swift v. Mayor*, 83 N. Y. 528.

¹⁰ *Brady v. New York*, 112 N. Y. 480.

¹¹ *Littler v. Jayne* (Ill.), 16 N. E. Rep. 374 [1888].

162. State or City to Furnish Certain Things at a Specified Price.—It is sometimes the practice of public corporations to purchase a certain brand or make of materials, the engineer and council being satisfied that they are the best, or it may be necessary to secure conformity throughout a system of works. When a city has contracted for supplies under such circumstances or has them in stock, it may require the contractor to purchase them at the price paid by the city and use them in the works.¹

163. Contracts for Patented Articles or Materials of a Special Manufacture.—If proposals are invited in good faith, it has been held that a city may contract for the use of such materials as it deems best, though such materials are the subject of private ownership or the product of exclusive manufacture, or the methods of preparing them are covered by patents.²

An ordinance providing for paving a street with a particular kind of asphalt in which there is a monopoly is not void, though the city charter provides for letting contracts to the lowest responsible bidder,³ the council having the right to reject the bid if it is exorbitant; the fact that there is a monopoly does not require that it be assessed.⁴ If the thing needed for public use is part of a patented article and can be bought only in one place, it is sometimes held that the article need not be advertised.⁵

In New York state it has been held that the provision which entitles the person making the lowest estimate to have the contract awarded to him does not apply to estimates for patented articles or processes.⁶ Some states hold to the view that such contracts are not prohibited; but the tendency of the courts, according to Judge Dillon,⁷ is that the statute prohibits any contract that cannot be advertised or let in the manner it prescribes, and he cites cases in which it has been held that a contract for a patented pavement with a person who had the exclusive right to lay the same was void.⁸ Mr. McKinney, in the American and English Encyclopædia of Law, says that the majority of the cases take the same view, and hold that the statutory prohibition applies to patented articles, citing numerous cases.⁹

It is impossible to tell, except in states where it has been already decided, what law would be sustained, and engineers or contractors would do well to take good counsel if the question come up in their business. The cases which hold that materials or processes which are patented or are the subject of a

¹ Merriam in Petition, 84 N. Y. 596 [1881].

² City of Newark v. Bomel (N. J.), 31 Atl. Rep. 408; N. P. Perrine, etc., Co. v. Quackenbush (Cal.), 38 Pac. Rep. 533; State v. Board of Comm'rs (Kan.), 45 Pac. Rep. 616.

³ Verdin v. City of St. Louis (Mo. Sup.), 33 S. W. Rep. 480. Burgess, J., dissenting.

⁴ Verdin v. St. Louis (Mo.), 27 S. W. Rep. 447.

⁵ Silsby Manfg. Co. v. Allentown (Pa.),

20 Atl. Rep. 646; accord Hobart v. Detroit, 17 Mich. 246; Matter of Petition of Dugro, 50 N. Y. 513; but see Dolan v. Mayor of N. Y., 4 Abb. Pr. N. S. (N. Y.) 397.

⁶ People v. Van Nort, 65 Barb. (N. Y.) 331; but see Boon v. Utica, 26 N. Y. Supp. 932; and Matter of Eager, 46 N. Y. 100.

⁷ Dillon's Munic. Corp'ns., § 467 (4th ed.).

⁸ Dillon's Munic. Corp'ns., § 468, note (4th ed. 1890).

⁹ 15 Amer. & Eng. Ency. Law 1093-94.

monopoly may be made the subject of a proposal and contract are given below,¹ as well as those which are to the contrary.²

164. Instances where Contracts have been Made for Things in Which there was a Monopoly.—Perhaps the law will be better understood by a few cases. Those which most frequently occur are in contracts for patented pavements and sidewalks, and there is no uniformity in the decisions of the different states. There are several cases of patented machines, one a pump, in which it was held that the fact that the pump authorized was patented did not relieve the board from the necessity of advertising for bids.³ Another case decides that a requirement that work shall be let to the lowest bidder does not forbid a contract for a garbage crematory, parts of which are patented, when the patents have been offered to the city or any contractor at a fixed price, and there is in fact free competition as to work and materials.⁴ In the same state it has been held that a city cannot contract for a patented pavement, no arrangement having been made with the patentee binding him to sell the privilege of using the process to the bidder at a fixed price.⁵ Where the royalty required to be paid on a patented article required to be used in the performance of a contract for public works was fixed, and the proposal inviting bids for the contract definitely stated that the royalty should be paid by the accepted contractor in a particular way, and several bids were actually made for the work, and the contract was let to the lowest bidder, there was actual competition by bids, in compliance with the law requiring the letting of the contract to the lowest bidder.⁶

In Louisiana it has been held that a city may contract with the highest bidder in order to remove and destroy, under certain regulations, the offal that is annoying to health.⁷

When the job embraces several kinds of work, some of which are patented, while others are not, it has been held in New York that separate proposals should be invited, one for that part which *is not* patented, and another for that which *is* patented and for which there can be no competition.⁸ Specifications in the alternative have been allowed in a case where the lathing to be used was required to be a certain "patent lathing," or "some other lathing of equal quality to be manufactured from sheet iron within the limits of the city."⁹

¹ *Hobart v. Detroit*, 17 Mich. 246; *Re Jugro*, 50 N. Y. 513; *N. P. Perrine Co. v. Quackenbush* (Cal.), 38 Pac. Rep. 533; *Verdin v. St. Louis* (Mo.), 27 S. W. Rep. 447; *Dean v. Charlton*, 23 Wis. 590; *Kilvington v. City of Superior* (Wis.), 53 N. W. Rep. 487; *Re McCormack*, 60 Barb. 128; *Worthington v. Boston* (Mass.), 41 Fed. Rep. 23 [1890]; *Harlem Gas Co. v. New York*, 33 N. Y. 202; *Nebraska City v. Nebraska Gas Co.*, 9 Neb. 339; *Yarold v. Lawrence*, 15 Kan. 126; *People v. Van Nort*, 65 Barb. (N. Y.) 331.
² *State v. Elizabeth*, 35 N. J. Law 351; *Boon v. Utica*, 26 N. Y. Supp. 932; *Nicholson Pavement Co. v. Painter*, 35 Cal.

699; *Burgess v. Jefferson City*, 21 La. Ann. 143; *Dean v. Charlton*, 23 Wis. 590; *Dean v. Borchsenius*, 30 Wis. 236; *Barber Asphalt Co. v. Hunt*, 100 Mo. 22.

³ *Worthington v. Boston*, 41 Fed. Rep. 23 [1890].

⁴ *Kilvington v. City of Superior* (Wis.), 53 N. W. Rep. 487.

⁵ *Dean v. Charlton*, 23 Wis. 590.

⁶ *State v. Board of Com'rs of Shawnee County* (Kan.), 45 Pac. Rep. 616; *see also* *Detroit v. Robinson*, 38 Mich. 108.

⁷ *State v. Payssan* (La.), 17 So. Rep. 481.

⁸ *Re Eager*, 46 N. Y. 100.

⁹ *Mulrein v. Kalloch*, 61 Cal. 522.

Contracts for work or public undertakings for which franchises or exclusive rights already exist, and by which competition is prevented, it seems are not within the statute requiring all contracts for work and materials to be advertised and let to the lowest bidder. It was therefore held that a contract made without inviting proposals with a gas company who had the exclusive right to supply a particular part of a city with gas was valid and binding.¹ A contract with the only electric-light company in the city without advertising was held valid.²

When professional services, as those of a surveyor, are required and he is to be employed, it has been held that the common council or board have no power to select with references to securing the necessary skill, and no advertisement is required.³ It has therefore been held that it was not necessary to advertise and to give to the lowest bidder a contract to furnish fireworks, for the reason that the articles were of a peculiar character, depending for their value upon the personal skill of the manufacturer.⁴ This is an interesting case, and the question may be properly asked if a contract for the erection of a lighthouse would come under the same rule, having been held that the construction of such a structure was particular work, depending upon the personal skill of the contractor, and such work as could not be completed by his executor or administrator.⁵ It is thought not.

The renting of chambers for the recorder of the city of New York has been held not to fall within a provision requiring all contracts for work or supplies to be let to the lowest bidder;⁶ nor do contracts for carriage hire of aldermen and councilmen when engaged in public service.⁷

165. Conditions and Stipulations as to the Performance and Completion of the Work.

1. *Work and Materials to be to Satisfaction of Engineer or Architect.*

Bidders will be required to furnish materials and to complete the entire work to the satisfaction of the engineer and in substantial accordance with the specifications hereunto annexed and the plan therein referred to. No extra compensation, beyond the amount payable for the several classes of work before enumerated, which shall be actually performed at the prices therefor to be specified by the lowest bidder, shall be due or payable for the entire work.

1'. *Inspection and Acceptance of Work.*

Each bidder must understand that should his proposal be accepted the materials delivered and the work performed by him, at any and all times during the progress of the work, and prior to final acceptance and payment, the same shall be subject to the inspection of the engineer or architect, or his authorized agent, with the full right to

¹ *Harlem Gas Co. v. New York*, 33 N. Y. 69; *Nebraska City v. Neb. Gas Co.*, 9 Neb. 39.

² *Hartford v. Hartford Elec. Lt. Co.*, 65 Conn. 324.

³ *People v. Flagg*, 5 Abb. Pr. (N. Y.) 232.

⁴ *Detwiller v. Mayor*, 46 How. Pr. (N. Y.) 218.

⁵ *Wentworth v. Cock*, 10 A. & E. 45.

⁶ *Davies v. New York*, 83 N. Y. 207.

⁷ *Smath v. New York*, 31 How. Pr. 1.

accept or reject any part thereof that in the opinion of the engineer or architect, or his authorized agent, is not strictly in accordance with the drawings and specifications; and that he must, at his own expense, within a reasonable time, to be specified by the engineer or architect, remedy any defective or unsatisfactory materials or work, and that in the event of his failure to do so after notice the engineer or architect will have the full right to have the same done and to charge the cost thereof to his account. Each bidder must understand that, should his proposal be accepted, inspection of or payment for, any portion of the work embraced therein by the engineer or architect, or his authorized agent, will not relieve him of responsibility to remedy any defective materials or workmanship, at his expense, at any time before final inspection and acceptance of and final payment for all of the materials and work contemplated by and embraced in his proposal.

2. *Prices to Include Everything.*

The prices bid are to cover all expenses of furnishing materials [except....., which will be furnished by the company or city] and to cover all expenses and furnishing of tools, labor, and utensils incidental to and necessary for the full completion of the work in conformity with the contract and specifications.

2¹. *Price Bid to Include Everything.*

Bidders will state a price for completing the work specified in the bill of quantities and described in the contract and specifications, which price is to include and cover the furnishing of all the material and labor and the performance of all the work requisite or proper for the purpose, and the completing of all the above-mentioned work and the materials in the manner set forth, described, and shown in the specifications and on the plans furnished for the work, and in the form of contract exhibited and furnished by the engineer.

3. *No Deviation from Plans and Specifications.*

Bidders are informed that no deviation from the specifications will be allowed unless a written permission shall have been previously obtained from the engineer or architect.

4. *Bonds to Maintain and Keep in Repairs.*

The successful bidder will be required to furnish bonds to maintain and keep in repair the whole of the works undertaken by him, and all other works, roads, and streets interfered with or rebuilt, for a period of.....months after the full performance and completion of the contract.

5. *Protection of Work and Materials.*

The successful bidder will be responsible for the proper care and protection of all materials delivered and work performed by him until the completion and acceptance of and final payment for all the work embraced in his proposal, and part payments from time to time on account of such materials and work will not in any way relieve him of such responsibility.

6. *Building Regulations.*

The successful bidder must fully comply with all municipal building ordinances and regulations, and obtain all required licenses and permits, and pay all charges and expenses connected therewith, and be responsible for all damage to persons or property which may occur in connection with the prosecution of the work.

7. *Skilled Labor.*

The successful bidder is to employ only skilled and reliable workmen

in the performance of the work, and must agree that the engineer or architect shall have the right to decide upon and discontinue the services of any workman employed by him on the work who does not possess satisfactory skill and qualifications or is otherwise objectionable.

8. *Bidder Must Furnish Bond for Payment of Labor and Materials.*

Each bidder must distinctly understand that if his proposal is accepted, he will be required to execute a formal bond or contract; and the part and final payments, as the vouchers are issued on account of the contract, shall be subject to a reserved right of the engineer or architect to withhold any part of the money to be paid under the contract in the event of the failure of the contractor to promptly make payments to all persons supplying him with labor or materials in the prosecution and completion of the work provided for in the specifications, drawings, and proposal.

9. *Commencement and Progress of Work.*

The work must be commenced ten days after the execution of the contract and prosecuted to completion without interruption or delay; the whole work is to be completed and delivered by the....day of 189..

10. *Number of Days Required to Complete the Work.*

Each bidder must also state the number of working-days he will require to complete the work, which number of days will be counted in the comparison of bids at the rate of twenty-five dollars (\$25) per day.

11. *Contractor's Delay.*

All additional expense to the.....by reason of extension of the contract at the request of the contractor shall be deducted from payments due or to become due the contractor at the rate of.....dollars for each and every day.

11¹. *Liquidated Damages.*

The damages to be paid for each day that the contract may be unfulfilled after the time specified for the completion thereof shall have expired are, by a clause in the contract, fixed and liquidated at.....dollars per day.

11². *Liquidated Damages.*

Each bidder must understand that should his proposal be accepted the sum of.....dollars as liquidated damages will be fixed for each and every day's delay not caused by the.....that may occur beyond the time stipulated in his proposal for the supply of all the materials and the performance and completion of the work.

11³. *Liquidated Damages.*

Liquidated damages of.....dollars per day are fixed by the terms of the contract for each and every day that the contract remains unfulfilled after the date of completion specified.

12. *Bonus for Early Completion.*

A bonus of....dollars per day will be paid for each and every day that the work is completed before the date specified for completion.

13. *Payments on Estimate.*

After the acceptance of a proposal, and execution and approval of a formal bond and contract, monthly payment will be made on account of the work actually done and in place in the structure; and such payments will be based upon the estimated value of the quantity of such work, computed from the contract unit of value, less 10 per cent. to be retained until the entire and satisfactory completion, final inspection, and acceptance of all the materials and work embraced in the contract,

at which time final payment of the balance due will be made; but no payment will be made for any materials delivered, but not actually put in place.

14. *Payments to Contractor Only.*

Payments will be made only to principals. Assignments and powers of attorney to collect moneys will not be recognized.

15. *Payments Contingent on Appropriations.*

Payments will be made upon monthly estimates, but contingent upon such appropriations as may from time to time be made by law, and ten (10) per cent. will be reserved from each payment until the completion of the contract.

16. *Officers Not Responsible.*

The payments to the contractor shall be made out of the funds under the control of the city, county, or state in their public capacity; and no member or officer of such city, county, or state, whether or not a party to this agreement, is to be personally responsible to the contractor.

17. *Cannot Assign or Sublet.*

The original contractor will be held to the performance of the contract, and transfers of contracts or of interests in contracts are prohibited (by law).

166. Conditions and Stipulations as to Performance and Completion of the Work.—The above stipulations are common to construction contracts and belong strictly to the contract itself, and are treated and discussed in sections specially devoted to them in Part III. They do not enter into the proposal except as being terms of the agreement which the bidder must execute.

167. Bond or Certified Check to Insure the Execution of the Contract, and Security for its Faithful and Complete Performance.

1. *Certified Check.*

Each bidder must submit with his proposal a certified check for.... dollars...., drawn to the order of....., as a guaranty that he will fully and faithfully comply with the terms of his proposal should the same be accepted, and that within ten days after the form is sent him he will execute a formal bond and contract in accordance therewith.

1'. *Bond or Certified Check.*

Each bid or proposal must be signed and sealed by the bidder and witnessed, and be accompanied by a bond, approved by....., in a sum equal to one tenth of the sum bid, as liquidated damages, conditioned that the party making the bid shall, within ten days after the acceptance of said proposal, execute the contract, with security approved by the engineer [commissioner] for its faithful performance. In case the bid be accepted, the formal bond to be executed and approved will be attached to and form a part of the advertisement, instructions, and conditions, specification, accepted proposal, letter of acceptance, and the drawings, all properly signed, within the time specified in this advertisement; or, in place of the bond to accompany proposal, the bidder may deposit with the commissioner a sum of money or a properly certified check of the same amount payable to....., said check to be returned to the bidder on the execution and delivery of the final contract and the bond required for its faithful performance.

1³. *Bid Must be Accompanied by Certified Check.*

No proposal will be received and considered unless accompanied by either a certified check upon a state or national bank drawn to the order of, or money, to the amount of . . . per centum of the amount of the security required for the faithful performance of the contract.

1⁴. No bid will be considered which has not responsible sureties upon its accompanied bonds, or, if without bond, is not accompanied by a certified check, as aforesaid.

1⁵. *Bond for Execution of Contract (U. S. Form).*

The bond attached to each bid must be signed by two responsible sureties, to be certified to as good and sufficient guarantors, by a judge of the United States court, a United States district attorney, collector of customs, or by some other officer under the United States government. Each guarantor must justify in a sum not less than one tenth of the whole amount of the proposal.

2. *Forfeiture of Check.*

Should the successful bidder fail or refuse to execute a formal bond or contract within ten days after the same is sent to him, his certified check may be declared forfeited, the letter of acceptance of his proposal may be revoked, and all obligations in connection therewith will be released and annulled.

2¹. *Forfeiture of Check.*

If the successful bidder shall refuse or neglect, within five days after notice that the contract has been awarded to him, and that the adequacy and sufficiency of the security offered by him is approved, to execute the contract, the amount of the aforesaid deposit made by him shall be forfeited to and retained by as liquidated damages for such neglect or refusal; but if he shall execute the contract within the time aforesaid, the amount of his deposit will be returned to him forthwith.

3. *Delivery of Certified Check.*

Such check or money is not to be inclosed in the sealed envelope containing the estimate, but it is to be delivered to No proposal will be received until such check or money has been deposited and examined and found to be correct.

4. *Return of Certified Checks.*

All deposits except that of the successful bidder will be returned to the persons making the same within three days after the contract is awarded.

4¹. *Return of Certified Check.*

The certified check of the successful bidder will be retained until the execution of a formal bond or contract, and the approval of the same by, and the certified checks of the unsuccessful bidders will be returned within three days after the proposal of the successful bidder shall have been accepted.

5. *Names of Sureties.*

Bidders are required to name the sureties or surety company who will sign the required bond in case the contract should be awarded to him or them.

5¹. *Consent of Sureties.*

Each bid or estimate shall be accompanied by the consent in writing of two householders of the state of, with their respective places of business or residence, to the effect that :

a. If the contract be awarded to the person making the estimate, they will upon its being so awarded become bound as his sureties for its faithful performance.

b. If he shall omit or refuse to execute the same, they will pay to the corporation any difference between the sum to which he would be entitled upon its completion and that which the corporation will be obliged to pay to the person to whom the contract may be awarded at any subsequent letting, the amount to be calculated upon the estimated amount of the work by which the bids are tested.

5². *Oath of Sureties.*

The consent above mentioned shall be accompanied by the oath or affirmation in writing of each of the persons signing the same that he is a householder or freeholder in the state of, and is the owner of property in value equal to the amount of the security required for the completion of the contract and stated in the proposals, over and above all his debts of every nature, and over and above his liabilities as bail, surety or otherwise; that he has offered himself as a surety in good faith and with an intention to execute the bond required by the law if the contract shall be awarded to the person or persons for whom he consents to become surety.

6. *Acceptability of Sureties.*

The adequacy and acceptability of all sureties and the amount and character of the surety for the fulfillment of the contract will be determined by the commissioners after the proposals are opened, the award made, and the contract signed.

7. *Sureties Must be Residents of State.*

If a bond be required with the contract, the sureties thereon must be residents of the state of and satisfactory to the commissioner.

8. *Surety Not an Officer or Partner.*

An officer of a corporation will not be accepted as surety for such corporation, nor will a firm be accepted as surety for a member of the partnership.

9. *Surety Must Not be in Default.*

No person will be accepted as surety who as a contractor has failed to satisfactorily perform any contract with the, or as a surety has failed to abide by a bond for the performance of such a contract, or as a guarantor has failed to abide by a guaranty accompanying a proposal. The surety must be signed by two responsible persons, who must justify before an official, authorized to administer oaths.

10. *Time in Which to Execute the Contract.*

The person or persons to whom the contract may be awarded will be required to appear at the office of the commissioner of public works with the securities offered by him or them and execute the contract within ten days (not including Sunday) from the date of notification of such award and that the contract is ready for signatures and sign the contract in triplicate.

11. *Ratio of Security to Proposal.*

The security required for faithful performance of the contract and specifications will not be more than one fourth ($\frac{1}{4}$) of the amount of the contract, and the right is reserved to increase the amount of said security after proposals are opened to a sum not exceeding one third ($\frac{1}{3}$) of the total consideration of the contract.

168. **Bond and Certified Check to Insure the Execution of the Contract and Surety for Faithful Performance and Completion of the Work.**—The bidder may be required to file, before the bids are opened, a satisfactory bond or certified check, conditioned that he will enter into a contract with good and sufficient surety if he is found to be the lowest bidder. Such a requirement is reasonable, and the lowest bidder cannot insist upon the acceptance of his bid without first filing such bond.¹ If he has neglected to do so before the proposals have been opened, it may be doubted if he can do so afterwards if the board refuse him the privilege. It seems that public officers may in their discretion excuse the failure to accompany the bid with such a bond. It has been held that a bond furnished on the same day that the proposal was accepted was sufficient.²

If, however, the statute or charter provides that whenever any improvement shall be declared necessary the council shall authorize the department of city works to advertise for bids under seal, which bids shall be publicly opened and announced, with the name of the bidder, the amount proposed, "and the names of the sureties," it will be held that such provision requires security to be given with every bid, such security to be a guaranty of the bid, as well as of the performance of the contract if awarded to the bidder.³ If a charter require security, but there is no provision as to the amount of the bond or as to its form, or whether it was to be furnished with the bid or after its acceptance, the regulation of such matter is left to the officers who are to receive the bid.⁴

Such a provision is necessary to insure good faith in bidders and to make sure that the proposals are not withdrawn before the contract is awarded. A proposal is a formal offer which by the law of contracts may be withdrawn or revoked at any time before it has been accepted; when accepted in precisely the terms of the proposal it becomes a binding contract. An acceptance which varies the terms of the offer is a counter-offer which may invalidate the offer.⁵

Therefore a deposit by one bidding for a city contract, made on condition that it be forfeited if the bidder fail to qualify after award of the contract, cannot be forfeited for his failure to sign a contract and bond securing its performance when the conditions therein are more burdensome than were the specifications contained in the advertisement,⁶ or where the contract is not based on legal proceedings of the municipal authorities.

Where it is an express condition of the acceptance of a bid that the bidder shall make a deposit, which is to be forfeited on his refusal to enter

¹ *May v. Detroit*, 2 Mich. N. P. 235.

² *Rabling v. Board (Ind.)*, 40 N. E. Rep. 1079; *semble Smith v. Philadelphia*, 2 Brews. (Pa.) 443.

³ *Selpho v. City of Brooklyn (Sup.)*, 39 N. Y. Supp. 50.

⁴ *Tuttle v. Love*, 7 Johns. (N. Y.) 470;

and see also *Lloyd's Law of Building and Buildings*, 93.

⁵ *Cotter v. Casteel (Tex. Civ. App.)*, 37 S. W. Rep. 791.

⁶ *N. P. Perrine Co. v. Pasadena (Cal.)*, 47 Pac. Rep. 777.

* See Law of Contracts, Chap. IV., Secs. 92-97, *supra*.

addresses given, in addition to the corporation signature, with official corporate seal thereto.

5. *Bids by Agents.*

Any one signing a proposal as the agent of another or of others must file with it legal evidence of his authority to do so.

6. *Officer's Authority to Bid.*

If a person signs for a corporation, he must present legal evidence that he has rightful authority to such signature, that the signature is binding upon the corporation, and that the corporation has a legal existence.

7. *Award of Contract.*

The award of the contract, if awarded, will be made to the bidder who is the lowest for doing the whole of the work, and whose estimate is regular in all respects. It must be understood that an acceptance by the board, council, or state, of proposals made, shall be conditional upon the execution of the formal contract (of which the plans and specifications are a part), and the furnishing of the required bond for its faithful and complete performance.

8. *Right to Reject Bids Reserved.*

The right to reject [any and] all bids (plans, and estimates), is reserved if the Commissioners of Public Works shall deem it for the interest of the so to do.

9. *Right Reserved to Waive Informalities.*

The board or owner reserves the rights to waive any informalities in any proposal that may be received, and to reject (any or) all proposals submitted in response to the advertisement, and to disregard the bid of any failing contractor known as such to the Engineer.

10. *Invitation to Opening of Bids.*

Bidders are invited to be present at the opening of the bids.

[Signed]

Dated

.....
Commissioners, Council, or Board.

171. Acceptance of Proposal and Execution of Contract. Right to Reject Bids.—When the statute does not require that the contract be awarded to the lowest bidder, public officers may, if they choose, invite competition, and in their discretion make alterations in the plans and specifications advertised before executing the contract and without the knowledge of competing bidders.¹ They must not abuse the discretionary power conferred, and their acts must be free from fraud.²

To determine what is the lowest aggregate bid, the bids must be considered in their entirety, and not by taking separate items from different bids.*

Where an advertisement for bids for the erection of public school buildings states that the board reserves the right to reject all bids, one making

¹ Kingsley v. Brooklyn, 5 Abb. N. Cas. (N. Y.) 1; Brevoort v. Detroit, 24 Mich. 322; Cummings v. Seymour, 79 Ind. 491; Insley v. Shipard, 31 Fed. Rep. 869.

² Elliot v. Minneapolis (Minn.), 60 N. W.

Rep. 1081; Shefbaur v. Board (N. Y.), 31 Atl. Rep. 454; Gilmore v. Utica (N. Y. App.), 29 N. E. Rep. 841; Hubbard v. Sandusky, 9 Ohio Cir. Ct. Rep. 638.

³ Hubbard v. Sandusky, *supra*.

the lowest bid has no right of action against the board where the bid is rejected and the contract given to another, though it was the rule of the board that contracts should be let to the lowest bidder.¹ It has been held that a contract may be awarded to one at any price within the legal rate fixed for public printing, though another offers to do the work for sixty per cent. less.² If the charter or a statute require the contract to be awarded to the lowest bidder after advertising for bids, a contract not so made and awarded will be void.³ If the statute provides that the contract "shall be let to the lowest responsible bidder," an ordinance or advertisement which states that "the commissioner reserves the right to reject *any* proposal at his discretion," is invalid.⁴ If the act or charter says the contract shall be awarded to the lowest bidder it is useless to "reserve the right to reject *any and all* bids," though it has been frequently held that "*all* the bids might be rejected."⁵ The body awarding the contract acting in good faith may refuse to award to any one if they deem it for the best interests of the public to do so. They may reject all the bids and readvertise for new proposals.⁶ It seems that the awarding of the contract may be indefinitely postponed,⁷ or the work may be abandoned altogether or the plans and specifications changed.⁸

It seems that the contract cannot be awarded to another who makes a better offer after the bids have been received and opened.⁹

172. Power to Determine Responsible Bidder is Discretionary.—If the statute provide that the contract be awarded to "the lowest responsible party" or to "the lowest responsible party furnishing good and sufficient security," the courts have usually held it to confer discretionary powers upon the public officers to determine whether or no the bidder was responsible and if his surety was good and sufficient.¹⁰ When such discretionary powers belong to a board of public officers the right "to reject any and all bids"

¹ *Anderson v. Board of Public Schools* (Mo. Sup.), 27 S. W. Rep. 610.

² *Board of Com'rs of Henry County v. Gillies* (Ind. Sup.), 38 N. E. Rep. 40.

³ *Little v. Jayne*, 124 Ill. 123; *State v. Licking Co.*, 26 Ohio St. 531.

⁴ *Lake Shore & M. S. R. v. City of Chicago* (Ill.), 33 N. E. Rep. 602.

⁵ *Walsh v. Mayor*, 113 N. Y. 142 [1889]; *People v. Croton Aqueduct*, 49 Barb. 259; *Bell v. City of Rochester*, 30 N. Y. Supp. 355; *People v. Aldridge*, 31 N. Y. Supp. 920; *Connolly v. Board* (N. J.), 30 Atl. Rep. 548; *Booth v. City of Bayonne* (N. J.), 28 Atl. Rep. 381, 15 Amer. & Eng. Ency. Law 1096; *Gunning G. Co. v. New Orleans* (La.), 13 So. Rep. 182; *People v. Willis* (Sup.), 39 N. Y. Supp. 987; *State v. Directors*, 5 Ohio St. 234; *Kelly v. Chicago*, 62 Ill. 279.

⁶ *Walsh v. Mayor*, 113 N. Y. 142 [1889]; *Connolly v. Board* (N. J.), 30 Atl. Rep. 548.

⁷ *People v. Aldridge*, 31 N. Y. Supp. 920.

⁸ *Keogh v. Wilmington*, 4 Del. Ch. 491.

⁹ *Kerr v. Philadelphia*, 8 Phila. (Pa.) 292.

¹⁰ *Douglass v. Commonwealth*, 108 Pa. St. 559; *Kelly v. Chicago*, 62 Ill. 279 [1871]; *Findley v. Pittsburgh*, 82 Pa. St. 351; *Interstate, etc., Co. v. Phila.* (Pa.), 30 Atl. Rep. 383; *Comm. v. Mitchell*, 82 Pa. St. 343; *Hoole v. Kinkaid*, 16 Nev. 217; *People v. Dorsheimer*, 55 How. Pr. (N. Y.) 118; *Hubbard v. Sandusky*, 9 Ohio Cir. Ct. Rep. 638; *People v. Mooney* (Sup.), 38 N. Y. Sup. 495; *State v. Bd. of Ed.* (Ohio), 20 Bull. 156; *semble*, *Van Reipen v. Jersey City* (N. J.), 33 Atl. Rep. 740; *and see State v. Marion Co.*, 39 Ohio St. 188; *People v. Gleason*, 4 N. Y. Supp. 383; *Weed v. Beach*, 56 How. Pr. (N. Y.) 470; *May v. Detroit*, 12 Am. L. Reg. (N. S.) 149; *McBrien v. Grand Rapids*, 56 Mich. 95.

seems to be properly reserved, the exercise of which right is subject to the close scrutiny of the court.¹

Sometimes the ordinance or act itself authorizes the engineer to reject any and all bids if deemed too high or the parties bidding are deemed irresponsible.² Under such a clause the act of the engineer in rejecting the lowest bid can be impeached only on the ground of bad faith.

If, as is sometimes the case, the statutes provide that "every such contract shall be deemed confirmed in and to such lowest bidder at the time of the opening of the bids,"³ then there is no discretion; the contract goes to the lowest bidder.

173. Discretion Must be Exercised in Good Faith.—The body or board or council accepting the bids must determine whether the lowest bidder is responsible and shows the ability and offers the security prescribed; and if the bid is not rejected because of a *bona fide* determination of the lack of such qualifications, it cannot be rejected for other extraneous causes.⁴ The word "responsible" has been held not to have reference to pecuniary ability alone, but to have reference to the skill, ability, and integrity of the bidder, and that it is proper to consider which bidder would be most likely to do faithful, conscientious work.⁵ The word "responsible" has been held to mean the ability to perform all the conditions of the contract; and the commissioner of public works may reject a bid, notwithstanding it is the lowest made, and the bidder is able to give the required bond, if, in the judgment of such official, after due investigation, the materials customarily used and the workmanship exhibited by the bidder in the performance of the kind of work required are poor and unsatisfactory.⁶

The discretion must be exercised in good faith and without fraud or collusion;⁷ and such a power to dispense with certain requirements conferred upon a board or council by act of legislature being discretionary, it cannot be delegated.⁸ The board cannot exercise an arbitrary discretion in awarding the contract, but must base its discretion on facts reasonably tending to support its determination.⁹

It seems that evidence is admissible to impeach the contract and show

¹ *People v. Willis* (Sup.), 39 N. Y. Supp. 987; *Peoples v. Byrd* (Ga.), 25 S. E. Rep. 677; *State v. New Orleans* (La.) 19 So. Rep. 690; *Gunning G. Co. v. New Orleans* (La.), 13 So. Rep. 182.

² *Johnson v. Duer* (Mo.), 21 S. W. Rep. 800; *State v. New Orleans*, *supra*.

³ *The People v. The Croton Aqueduct*, 49 Barb. 259 [1867].

⁴ *Shaw v. Trenton*, 49 N. J. Law 339 [1887].

⁵ *Comm. v. Mitchell*, 82 Pa. St. 343; *Hoole v. Kinkaid*, 16 Nev. 217; *Reuting v. Titusville* (Pa. Sup.), 31 Atl. Rep. 916.

⁶ *People v. Kent* (Ill. Sup.), 43 N. E. Rep. 760; *Peoples v. Byrd* (Ga.), 25 S. E. Rep. 677; *State v. St. Bernard*, 10 Ohio Cir. Ct. Rep. 74.

⁷ *Reuting v. Titusville* (Pa.), 34 Atl. Rep. 916; *Ross v. Bd. of Ed.*, 42 Ohio St. 374; *Hubbard v. Sandusky*, 9 Ohio Cir. Ct. Rep. 638; *Van Relpen v. Jersey City* (N. J.), 33 Atl. Rep. 740; *Gunning G. Co. v. New Orleans* (La.), 13 So. Rep. 182; *People v. Town of Campbell*, *note* 8; *State v. Betts*, 4 C. C. (Ohio) 86.

⁸ *Re Emigrant Ind. Sav. Bank*, 75 N. Y. 388; *but see People v. Town of Campbell* (Sup.), 36 N. Y. Supp. 1062, *where engineer was authorized to receive proposals and award contract; and see Board v. Kemp* (Ind. App.), 43 N. E. Rep. 314.

⁹ *McGovern v. Board* (N. J. Sup.), 31 Atl. Rep. 613; *semble, In re McCain* (S. D.), 68 N. W. Rep. 163.

that the bid accepted was not in fact the lowest according to the data proposed as tests, without alleging a fraudulent collusion between the bidder and the officers awarding the contract.¹

174. Bids Rejected but Reconsidered Without a New Advertisement.—A common council which has rejected all bids received in reply to an advertisement for proposals may at a subsequent meeting, without readvertising for new proposals, reconsider the vote of rejection and award the contract to one of the original bidders. It has been so held.² It may be doubted if the bidder could be held to his offer, it having been once rejected and not renewed again. Therefore when the instructions to bidders required a guaranty that the bidder would not withdraw his proposal within sixty days, and that if the same were accepted he would enter into a contract within ten days after the day on which he should be notified of such acceptance, it was held that after that time, as against the bidder, the bid could not be accepted; and it was further held, that though personal notice of the acceptance was intended, and that though notice was deposited in the mail a few days before the expiration of the sixty days, but which did not reach the bidder until after the expiration of that period, was insufficient to render him or his guarantors liable for a failure to enter into a contract.³*

A second advertisement for bidders has been held unnecessary in case of nonperformance by the original contractor, the liability of the contractor and his sureties having been deemed adequate indemnity against additional expense in completing the work. If the expense has not been increased by fraud and irregularity, an assessment levied under the act cannot be vacated or reduced.⁴ The fact that the work was completed at an expense considerably exceeding the contract price does not, it seems, require that it should have been readvertised and relet.⁵

175. Not Always Necessary to Readvertise.—When the lowest bidder had failed or refused to enter into the contract and to give the guaranty required, it was held that the contract might be awarded to the next lowest bidder without readvertising for bids;⁶ but it seems that the next lowest bidder cannot compel the award of the contract to him.⁷

There are cases to the contrary which hold that if the lowest bidder withdraw his bid it is necessary to advertise again, and not to award the contract to the next lowest bidder.⁸ The charter may require that notice be given at a reletting of a contract the same as at the first letting, and the contract re-awarded to the lowest bidder, in which case it must be strictly followed.⁹

¹ *Brady v. Mayor*, 20 N. Y. 312 [1859].

² *Ross v. Stackhouse*, 114 Ind. 200 [1887].

³ *Haldane v. United States (C. C. A.)*, 69 Fed. Rep. 819.

⁴ *In re Leeds*, 53 N. Y. 400 [1873], *Justice Allen dissenting*.

⁵ *In re Leeds, supra*; *Brass Foundry Works v. Parker Co.*, 115 Ind. 234, *construction of a public building*.

⁶ *Gibson v. Owens (Mo. Sup.)*, 21 S. W. Rep. 1107.

⁷ *State v. Shelby Co.*, 36 Ohio St. 326; *see also Mackenzie v. Baraga Tp.*, 39 Mich. 554.

⁸ *Twiss v. Port Huron*, 63 Mich. 528 [1886]; *s. c.*, 30 N. W. Rep. 177.

⁹ *Dillon's Munic. Corp'ns* [4th ed.], § 466, *note, and cases cited*.

* *See Sec. 95, supra*.

Some cases hold that after bids have been received material alterations cannot be made in the contract awarded without a new advertisement.¹ *

If the contractors abandon the work, the act of their surety in finishing the building for the city as their agent has been held simply the completion of the original contract, and hence that the letting of a new contract to a new "lowest bidder" is unnecessary.²

If the contractor has abandoned the work, a contract by the county with the subcontractor to pay him for work done by him or to be done by him was held not void if the work had progressed so that in the judgment of the commissioners it might be completed substantially under the original contract, and by keeping in operation the agencies already in motion.³ Work so abandoned may, it seems, be completed without readvertising or competition at fair prices, even though the expense considerably exceeds the contract price.⁴ If the lowest bidder be allowed to withdraw his bid on the ground of a mistake, it seems it is improper to award the contract to the next lowest bidder. The work should be advertised again, and other bidders be allowed to revise their bids.⁵

These are special cases, and are so fortified with conditions that a general statement of the law can scarcely be made. Indeed, it can hardly be desired that such general law should exist, for it might be employed as a means of avoiding the statute by getting a mock contractor to undertake the work and then abandon it to the merciless grasp of conspirators and boodlers.

When proposals have been solicited for public work and they have been received, giving separate bids for the material and different kinds of work required in the construction, one of which has been accepted with the understanding that when the structure is located the amount to be paid will be determined by its length and size upon the basis fixed in the bid, it is not necessary to advertise for new proposals when the structure is located, even though it is considerably shorter than was the one bid upon.⁶ And when the advertisement and proposal was for paving a specified distance and the contract entered into was to pave only a part of that distance, "or further if ordered," it was held that it was not necessary to readvertise for proposals when the balance of the work was ordered to be done; that it was covered by the original contract.⁷ If the council resolve to readvertise for bids for a street improvement because the lowest bid is in excess of the estimate by the engineer, their act must be approved by the mayor, or passed over his veto, as provided in the city charter.⁸ If no notice to the

¹ Dickinson v. Poughkeepsie, 14 N. Y. Super. Ct. 1.

² McChesney v. City of Syracuse (Sup.), 22 N. Y. Supp. 507.

³ Bass F. & F. Works v. Parker County (Ind.), 115 Ind. 234 [1888].

⁴ Matter of Leeds, 53 N. Y. 400.

⁵ Twiss v. Port Huron, 63 Mich. 528.

⁶ Insley v. Shepard, 31 Fed. Rep. 869 [1887]; Brevoort v. Detroit, 24 Mich. 323.

⁷ Brevoort v. Detroit, *supra*.

⁸ Booth v. City of Bayonne (N. J.), 28 Atl. Rep. 381.

* See also Sec. 155-160, *supra*.

mayor be required by law, a contract for a public improvement may be awarded legally, without any notification by the commissioners to the mayor of the meeting when the award was made.¹

176. Whether Lowest Bidder can Compel an Award to Himself.—Whether or not a board may be compelled to award the contract to the lowest bidder is not fully settled. There are numerous decisions partly to the effect that a court will not compel the city or its board to award the contract to the lowest bidder;² that when a board is invested with a discretion, the court will not seek to control it in the absence of fraud or bad faith.³ The fact that the lowest bid is considerable [\$1500] greater than the estimate cost does not warrant the inference that its acceptance was fraudulent.⁴*

It has been held that when an act directs municipal officers to award a contract "to the lowest responsible bidder" it vests discretionary powers in such officers, the word "responsible" applying not only to pecuniary ability, but also to judgment and skill of the contractor.⁵† Such officers are free from control so long as they act in good faith, though they do act erroneously and indiscreetly.⁶ The court will not interfere with the commissioners if they have exercised reasonable care to advise themselves whether the lowest bidder could be depended on to do the work bid for with ability, promptitude, and fidelity, and in good faith concluded that he could not, though the court be satisfied that such conclusion was erroneous,⁷ or that they have been indiscreet.⁸ A board of public works is better qualified to determine what bid for a public work should be accepted than a court of chancery can be, and the court will interfere only where the chancellor can see that the board has either acted in violation of law or in such a manner that its contract virtually amounts to a fraud.⁹

The lowest bidder is usually held to acquire no legal right to compel by mandamus that the contract shall be awarded to him when discretionary power has been conferred upon the commissioners.¹⁰ The fact that a bidder

¹ Terrell v. Strong (Sup.), 35 N. Y. Supp. 1000; see also Barber Asph. P. Co. v. Ullman (Mo. Sup.), 38 S. W. Rep. 458.

² Dillon's Munic. Corp'ns, § 32, note, and many cases cited.

³ Kelly v. Chicago, 62 Ill. 279 [1871]; Douglass v. Commonwealth, 108 Pa. St. 559; Howlett v. Directors, 5 Ohio St. 235; [1856]; People v. Croton Aq. Board, 49 Barb. 259; Findley v. Pittsburgh, 82 Pa. St. 351; see also Grant v. Common Council (Mich.), 52 N. W. Rep. 997; Comm. v. Mitchell, 82 Pa. St. 343; Hoole v. Kinkaid, 16 Nev. 217; Weed v. Beach, 56 How. Pr. (N. Y.) 470; People v. Contracting Bd., 27 N. Y. 378, 33 N. Y. 382; State v. Bd. of Ed., 42 Ohio St. 374; People v. Kent (Ill.), 43 N. E. Rep. 760; In re McCain (S. D.), 68 N. W. Rep. 163; Johnson v. Sanitary

Dist. (Ill. Sup.), 45 N. E. Rep. 213; Wright v. Com'rs, 6 Mont. 29.

⁴ Booth v. City of Bayonne (N. J. Sup.), 28 Atl. Rep. 381.

⁵ Interstate, etc., Co. v. City of Phila. (Pa.), 30 Atl. Rep. 383; Douglass v. Commonwealth, 108 Pa. St. 559.

⁶ Douglass v. Commonwealth, 108 Pa. St. 559.

⁷ State v. Village of St. Bernard, 10 Ohio Cir. Ct. R. 74.

⁸ Findley v. City of Pittsburgh, 82 Pa. St. 351.

⁹ Johnson v. Sanitary Dist. of Chicago, 58 Ill. App. 306.

¹⁰ 15 Amer. & Eng. Ency. Law 1097; State v. Kendall, 15 Neb. 262; State v. Dixon Co. (Neb.), 37 N. W. Rep. 936; State v. McGrath, 91 Mo. 386; and see De-

* See Chap. I., Secs. 50-56, *supra*.

† See Sec. 173, *supra*.

was the lowest, and has been reported to the common council as such, does not establish a binding contract with a city until approved and ratified by the common council, as required by law.¹*

When a charter provides that the contract shall be "let to the lowest reliable and responsible bidder," it requires public officers to exercise discretion and determination, and it has been frequently held that courts would not issue an injunction to prevent an award of a contract to one who was not the lowest bidder.² The facts must be made to appear sufficiently to show that they bring the case within the officers' discretion, and that it was exercised in obedience to law.³

177. Public Officers may be Enjoined from Illegally Awarding Contract.—

It is well settled that any taxpayer can, or if a taxpayer be the lowest bidder he can himself, bring suit in equity to enjoin the execution of a contract illegally awarded.⁴ The lowest bidder can do this though he is prompted by other considerations than his liability to excessive taxation.⁵ So where a council merely finds that the one to whom the contract was awarded was "the lowest and best bidder" without finding any facts which rendered another, who was apparently the lowest bidder, not the lowest bidder in fact, the performance of the contract will be enjoined.⁶

The discretion vested in commissioners will be controlled by the courts only when necessary to prevent fraud, injustice, or the violation of a trust;⁷ and the mere fact that the commissioners awarded the contract to one not the lowest bidder is insufficient to establish the charge that they acted fraudulently or illegally.⁸

If public officers are about to award a contract without advertising for bids as required by law, or if a contract has been let in violation of the law, a court of equity will prevent the execution or performance of the contract at the instance of any taxpayer. The allegation and proof of fraud will cause an injunction to issue to restrain the awarding of the

troit F. P. Co. v. Auditors, 47 Mich. 135; *State v. Supervisors York Co.*, 17 Neb. 643; *People v. Bd. of Ed.*, 5 N. Y. Supp. 392; *Mayo v. Hampden Co. Comm'rs*, 141 Mass. 74; *People v. Campbell*, 72 N. Y. 496; *Deckman v. Oak Harbor*, 10 Ohio Cir. Ct. Rep. 409; *State v. Scott*, 17 Neb. 686; *People v. Croton Aq. Board*, 26 Barb. (N. Y.) 240; *Rabling v. Board of Comm'rs* (Ind. Sup.), 40 N. E. Rep. 1079; *cases collected* 14 Amer. & Eng. Ency. Law 210, note 6; *East River Gas Co. v. Donnelly*, 93 N. Y. 557; *Times Pub. Co. v. City of Everett* (Wash.), 37 Pac. Rep. 695.

¹ *Smith v. Mayor*, 10 N. Y. 504; and see *Walsh v. New York*, 113 N. Y. 142; and see also *United States v. Lamont*, 15 Sup. Ct. 97.

² 15 Amer. & Eng. Ency. Law 1096; and see *Grant v. Common Council* (Mich.),

51 N. W. Rep. 997.

³ *Commonwealth v. City of Philadelphia* (Pa. Sup.), 35 Atl. Rep. 195.

⁴ *Board v. Gillies* (Ind.), 38 N. E. Rep. 40; and see *Christian v. Dunn* (Com. Pl.), 8 Kulp 320; *Wood v. Pleasant Ridge*, 13 Ohio Cir. Ct. Rep. 177; *Comm'rs v. Templeton* 51 Ind. 266.

⁵ *Times Pub. Co. v. Everett* (Wash.), 37 Pac. Rep. 695; *semble*, *People v. Contracting Board*, 33 N. Y. 382; and see *Peoples v. Byrd* (Ga.), 25 S. E. Rep. 677.

⁶ *Times Pub. Co. v. Everett* (Wash.), 37 Pac. Rep. 695.

⁷ *Terrell v. Strong* (Sup.), 35 N. Y. Supp. 1000; *Johnson v. Sanitary Dist.* (Ill. Sup.), 45 N. E. Rep. 213.

⁸ *Terrell v. Strong* (Sup.), 35 N. Y. Supp. 1000.

* See Sec. 183, *infra*.

contract;¹ and injunction seems to be the proper remedy,² though not a necessary remedy, it seems. If a taxpayer has before the commencement of the work notified the contractors that he would contest the legality of the proceedings under which they were acting, he is in a position, after they have completed the work, to ask that the placing of a lien on his property for the cost of construction be enjoined.³

It has been held that when a contract was awarded to a bidder who was only \$200 higher than the lowest bid, only \$30 of which was to be paid by the city, and the mistake was one of judgment merely and not intentional, it did not warrant the intervention of the attorney-general.⁴ It has been held to be illegal to divide the work between the highest and lowest bidder.⁵

178. What Remedies a Bidder May Have.—Contractors before demanding the rights of the lowest bidder under the charter of a city or a special act of legislature should make sure that the law requires the contract to be given to the lowest responsible bidder. They should have taken pains to conform strictly to the notices, instructions, and ordinances made in regard to the work.⁶ A statute conferring the entire control of the work for procuring a water-supply upon water-commissioners, and directing them to give public notice for proposals, but which does not require them to let the work to the lowest bidder, was held to give the commissioners full discretion as to the acceptance or rejection of all sealed proposals.⁷ When public officers have exceeded their powers and deprived the lowest bidder of his lawful rights to the award of a contract, the question very naturally comes up as to what remedies he has to recompense him for the loss and the injustice he has suffered. There are a few cases to the effect that if the bidder can show that he is legally entitled to the contract under the terms of the act, he may enforce the award by mandamus although the contract has been awarded to another party. The lowest bidder must have used reasonable diligence in asserting his rights and have done nothing to waive his rights.⁸

There are decisions to the effect that the bidder has no ground for mandamus, as he has no cause of action and no clear legal rights until the contract is made and concluded.⁹ In Ohio it has been held that if the

¹ *Smith v. Phila.*, 2 Brews. (Pa.) 443; *Follmer v. Nuckolls Co.*, 6 Neb. 204; *Schumm v. Seymour*, 24 N. J. Eq. 143.

² *Hoffman v. Board* (Mont.), 44 Pac. Rep. 973.

³ *Brace, C.J., and Sherwood and Robinson, J.J., dissenting.*—*Verdin v. City of St. Louis* (Mo. Sup.), 33 S. W. Rep. 480. See also *Dibble v. New Haven* (Conn.), 56 Conn. 199, where the building committee had been instructed by vote to let work to lowest bidder;—no injunction was granted.

⁴ *Attorney-General v. Detroit*, 26 Mich. 263; and see *Attorney General v. Boston*, 123 Mass. 460.

⁵ *McDermott v. Board of Street and*

Water Com'rs of Jersey City (N. J. Sup.) 28 Atl. Rep. 424.

⁶ *Wiggins v. Philadelphia*, 2 Brews. (Pa.) 444; *State v. York Co. Com'rs*, 13 Neb. 57; *Weed v. Beach*, 56 How. Pr. (N. Y.) 470; *State v. Bartley* (Neb.), 70 N. W. Rep. 367.

⁷ *Flemming v. City of Suspension Bridge*, 92 N. Y. 368 [1883].

⁸ *Boren v. Com'rs of Darke Co.*, 21 Ohio St. 311 [1871]; *Wood's Master and Servant* (2d ed.) 162.

⁹ *People v. Croton Aq. Board*, 26 Barb. (N. Y.) 240; *Weed v. Beach*, 56 How. Pr. (N. Y.) 470; *Kelly v. Chicago*, 62 Ill. 279.

lowest responsible bid be rejected and any other be accepted, the action of the board may be controlled by mandamus without doing violence to the rule that in matters involving judgment and discretion the board cannot be controlled by mandamus proceedings. The lowest bidder must show a clear legal right in himself.¹ Another case holds that even when a bid for public work has been accepted, and the contractor has a clear right to the contract, yet mandamus will not lie to compel the commissioners to execute the contract; that the proper remedy is an action against the city for damages.² It has been held that the lowest bidder had no right of action *at law* against the city to recover profits which he might have made had his bid been accepted.³

A recent case decides that the provision in a city charter that contracts for public work shall be awarded to the lowest reliable and responsible bidder is not for the benefit of a bidder for such work, but to protect the property-holders and taxpayers, and therefore the lowest reliable and responsible bidder has no such vested or absolute right to a compliance with such provisions of the statutes as will entitle him to maintain a suit to enjoin their violation by public officials; that the presentation by a reliable and responsible bidder of the lowest bid to officials whose duty it is to let the contract to the lowest reliable and responsible bidder, but who have the right, under the statute, to reject all bids, and who have given notice in their advertisement for bids that they reserve the right to reject any and all bids, does not constitute an agreement that they will make a contract for the work with such a bidder; nor does it vest in him such an absolute right to the contract as will authorize a court of equity, at his suit, to compel the officials, or the municipality they represent, to enter into a contract for the work with him, when they are about to award, or have awarded, it to a higher bidder.⁴

Whether mandamus will lie is in the discretion of the court; and an allegation by the board of public works that no appropriation exists to cover the expense of the works, and that they have changed the design and character of the work to be done, and have decided that the public interests required that the work should be readvertised and let under proposals framed in accordance with such alterations, was good, and a discretion they might properly exercise.⁵

A refusal to approve the contract on the ground that the work was to be done with a certain brand of material named, when it appears that the contractor has furnished samples of material of the kind and quality required and named, and that the contract has been made with reference to such samples, is technical and without foundation; but when the contract

¹ *State v. Bd. of Ed.*, 42 Ohio St. 374.

² *People v. Campbell*, 72 N. Y. 496.

³ *Talbot Pav. Co. v. Detroit (Mich.)*, 67 N. W. Rep. 979; *East Riv. G. Lt. Co. v. Donnelly*, 93 N. Y. 557.

⁴ *Colorado Paving Co. v. Murphy (C. C. A.)*, 78 Fed. Rep. 28.

⁵ *People v. Croton Aq. Board*, 49 Barb. 259.

has been given to another party and the work done, a court in its discretion would not grant a writ of mandamus to compel the city council to approve the contract.¹

If the act undertaken by the city council or public officers is unlawful, it seems fairly well settled that the prosecuting officer of the state may file a bill in equity to restrain illegal acts or have them corrected; but when the officers had acted in good faith, and by an error of judgment committed unintentionally, a contract was let to a bidder who was not the lowest, but which increased the expense by \$20 only, and the contractor had incurred large expense to carry out the contract, and there was no complaint by the taxpayers, it was held that the amount was too small to warrant any interference by the attorney-general.²

179. Liability of Public Officers for Acts Discretionary or Quasi-Judicial; Misdeeds in Awarding the Contract.*—It is a well-settled rule that no public officer is responsible in a civil suit where his acts have been judicial or discretionary, however erroneous or indiscreet they may have been. Some cases have gone so far as to hold that public officers in their judicial capacity were exempt from civil actions, however erroneous or malicious their acts may have been.³ To a contractor this will seem questionable law—law quite devoid of justice. The hardships it promises are tempered somewhat by many decisions that modify this declaration. It has been said that a judicial officer acting without corrupt or malicious motives is not liable in damages for an erroneous interpretation or application of the law and that this same exemption embraces his acts in a *quasi-judicial* capacity.⁴ So it has been said by good authority that certain acts and duties of public officers partake of the character of legislative and judicial functions, though not strictly so; but they may be so far of that nature as to exempt the officers from any liability for injuries resulting from their acts.

Among the duties and acts that belong to this class are those frequently required of engineers and commissioners, such as the location of sewers and other improvements, the adoption of plans and the determination of dimensions and sufficiency of things which should be distinguished from the subsequent carrying out of the plans. In the one case the officers and city are considered as acting judicially, which excuses it and them from liability for injuries resulting from errors of judgment, and perhaps even those from negligence.⁵† The letting of contracts to the lowest responsible bidder has

¹ Talbot Paving Co. v. Council of Detroit (Mich.), 51 N. W. Rep. 933 [1892]; citing State v. Bd. of Ed., 24 Wis. 683; People v. Contracting Bd., 27 N. Y. 378; People v. Campbell, 72 N. Y. 496; People v. Kent (Ill.), 43 N. E. Rep. 760; Kelly v. Baltimore, 53 Md. 134.

² Dillon's Munic. Corp'n's § 913 and note; see also 15 Amer. & Eng. Ency. Law 1093, note.

* See also Secs. 244-259, *infra*.

³ East River Gas Co. v. Donnelly, 93 N. Y. 557, and 25 Hun 615 [1881]; People v. Gleason (N. Y.), 25 N. E. Rep. 4, [1890]; 19 Amer. & Eng. Ency. Law 489.

⁴ The Muscatine R. Co. v. Norton, 38 Iowa 33 [1873].

⁵ Bishop's Non-Contract Law, § 746; Kirchman v. West & S. T. Ry. Co., 58 Ill. App. 515.

† See Secs. 245-8 and 244-259, *infra*.

been held a judicial act, for the erroneous exercise of which no action would lie against the city.¹ The act should clearly be one which requires the exercise of judgment and discretion of a judicial or legislative nature, or its corrupt or negligent performance will create a liability to the injured party.²

In New Jersey it has been held that when a city charter or act of legislature expressly prohibits the making of a contract for work without having previously advertised for proposals in a prescribed mode, an award of a contract by a city official without such previous advertisement, made willfully and with evil intent, has been held to constitute a criminal offense, and to render the officer liable to indictment. It was the officer's duty to award the contract to the lowest responsible bidder, and a charge that the officer willfully and corruptly gave the contract to a bidder who had not offered the more advantageous terms was held to constitute a criminal offense.³

Neither the city nor its board is liable to an action of damages for refusing to accept the lowest offer or tender made, if the refusal is in good faith and judgment.⁴ The duty to award the contract has been held a duty to the public, and not to an individual, for the violation of which duty the statute gave no action; the lowest bidder could not therefore recover profits he would have made if the contract had been awarded to him.⁵ It is well settled that *the city* is not liable for damages arising from the rejection of the lowest bid by a department of public works intrusted with its works. This was held even when the statute declared that the contract "shall be let to the lowest bidder at the time of the opening of the bids, and shall be forthwith duly executed with such lowest bidder."⁶

Selectmen who have been directed at a town meeting to contract for a public work, "the proposal to be advertised and the contract given to the lowest bidder," and who advertised for work and reserved to themselves "the right to reject all bids if none were satisfactory," were held to be authorized to refuse to award the contract to the lowest bidder and to reject all bids, and that the bidder had no right of action against the town on the contract, nor for time and money spent in making estimates of the work, and that his rights were not affected by a subsequent town meeting referring the whole matter to the selectmen to build at the earliest possible moment.⁷

180. Liability of Public Officers for Ministerial Acts.—If the duties of the public officer are not discretionary or of a judicial nature, he is liable for

¹ Bishop's Non-Contract Law, § 747.

² Bishop's Non-Contract Law, § 748.

³ State v. Kern, 51 N. J. Law 259 [1889].

⁴ Dillon's Munic. Corp. (4th ed.), cases collected, § 470.

⁵ East River Gas Lt. Co. v. Donnelly, 93 N. Y. 557.

⁶ Walsh v. New York City, 20 N. E. Rep. 825 [1889]; s. c., 113 N. Y. 142; and see Meechem on Agency, and Dillon's

Munic. Corporations.

⁷ Palmer v. Haverhill, 2 Amer. Corp. Cas. 450; s. c., 98 Mass. 487 [1868]; Peoples v. Byrd (Ga.), 25 S. E. Rep. 677; Murdough v. Town of Revere (Mass.), 42 N. E. Rep. 502; and see Audsley v. New York (C. C. A.), 74 Fed. Rep. 274, where architects were invited to submit competitive prize plans, and the project was abandoned.

negligence or wrongdoing to any one sustaining special damage in consequence thereof. So held when the same powers and duties which once belonged to a public officer were bestowed upon a contractor. Contractor was held responsible.¹

When commissioners have accepted a proposal and directed a contract to be made with the bidder, but later they rescinded the resolution and resolved to do the work themselves on plans reported by and under the supervision of a committee, and to appoint a superintendent of the work; they are undertaking to carry out the work which as judicial officers they had resolved on and they cease to act as officers exercising judicial and legislative duties,² and become liable individually for the consequences of their negligent acts, the city being relieved from responsibility.³

So, too, public officers intrusted with the conduct of public work are subject to a personal action for damages if they have willfully exceeded their powers or have maliciously or corruptly transgressed their prescribed duties. The element of malice and corruption must exist when public officers are clothed with discretionary powers, for a court will not inquire into them so long as they are honestly exercised.⁴

Though the members of a common council, acting judicially in determining who is the lowest bidder, are not liable in a civil action or a criminal prosecution for their action, yet such immunity cannot be evoked by a higher bidder, who has been given the contract, to establish the validity of the contract; nor will the fact that the council has audited and allowed the claim give it any validity.⁵ *

181. Bids Cannot be Recalled.—When bids have been made and accompanied by certified checks, they cannot be recalled or withdrawn neither before nor after the bids are opened—not even by permission of the public officers who have the work in charge and who award the contract.⁶

Public officers are invested with no discretion to permit amendments or alterations of proposals on account of any alleged mistake therein, unless the fact of such mistake and the requisite data for its correction are apparent on the face of the proposal.⁷ *

182. The Acceptance or Award.—A notice to the public of proposed works, asking for proposals, is an invitation for tenders or a request for offers, and cannot be regarded as an offer to be accepted by the person who makes himself the lowest bidder. The tender or proposal submitted by the bidder must be accepted before a contract is created.⁸ Not until the proposal of the

¹ Robinson v. Chamberlain, 34 N. Y. 389 [1866].

² Robinson v. Rohr (Wis.), 40 N. W. Rep. 668 [1888].

³ Edwards v. Ferguson, 73 Mo. 686 [1881], and cases cited.

⁴ People v. Gleason (N. Y.), 25 N. E. R. 4 [1890]; Gas Light Co. v. Donnelly, 93

N. Y. 557.

⁵ Kimball v. Hewitt, 2 N. Y. Supp 697 [1888]. A like decision was rendered by the attorney-general of the United States in June, 1895.

⁶ Beaver v. Trustees, 19 Ohio St. 97; Twiss v. Port Huron, 63 Mich. 528.

⁷ Dillon Munic. Corp. (4th ed.), § 470;

* See Liability of Engineer, Secs. 226-259, *infra*.

bidder is accepted are the contract rights created, and both parties liable to damages for refusing to carry it out. When written proposals for work to be done are followed by a written bid and a written acceptance of such a bid by the proper authorities, a binding contract is created to do the proposed work.¹ *

183. What Constitutes an Acceptance of the Proposal or an Award of the Contract.—A bid made according to advertisement and accepted by the proper authority creates a contract of the same force as if a formal contract had been written out and signed by the parties.² The award of a contract to the lowest bidder creates a binding contract on behalf of the city to subsequently execute a contract, for a breach of which the city is liable in damages to the bidder.³ The record of the proceedings of a school board, signed by the secretary thereof, reciting a resolution to accept the bid of one of its own members to furnish supplies, is sufficient evidence of the contract.⁴ The acceptance must be in the terms of the proposal, without changes or modifications of the contract, plans, or specifications. An acceptance in other terms is but a counter offer, and it may invalidate the offer unless the change be agreed to by the bidder.⁵ * A bidder will be entitled to refuse to sign, and be justified in so doing, when the formal written contract presented for his signature contains stipulations not in the advertisement proposal and records.⁶ If he does sign the agreement he will be bound by it, the bid being held to be merged into the formal contract.⁷

If the acceptance is unqualified and no new terms are contemplated, it is irrevocable and binding. A subsequent notification that the acceptance was reconsidered is no defense to an action on the contract.⁸ If the bid be regularly made and it is the lowest, the acceptance of it creates a vested right to the contract, which cannot be taken away by subsequent legislation without just compensation.⁹

A lowest bidder to whom the contract was awarded does not, by accepting

Doyle v. Dusenberg, 74 Mich. 79; Howard v. School, 78 Me. 231 [1886]; Spencer v. Harding, L. R. 5 C. P. 561 [1870]; see 2 Engineering Magazine 481-487; Forster v. Ulman, 64 Md. 523.

¹ Willes v. Hoss (Ind.), 16 N. E. Rep. 800 [1888], 114 Ind. 371 [1887]; Jackson v. N. Wales Ry. Co., 1 Hall & T. 75; s. c., 6 Ry. Cas. 112. A schedule of prices for work and materials signed by the parties has been held not to be a written contract for the erection of a building. Eyser v. Weisgerber, 2 Iowa 463.

² Garfelde v. United States, 93 U. S. 242; Lewis v. Brass, L. R. 3 Q. B. D. 667 [1877]; The Guardians v. McLoughlin, 4 Ir. Rep. C. L. 457 [1856].

³ Lynch v. City of New York (Sup.), 37

N. Y. Supp. 798; Gt. Northern R. Co. v. Witham, L. R. 9 C. P. 16.

⁴ Alexander v. Johnson (Ind. Sup.), 41 N. E. Rep. 811.

⁵ Tuttle v. Love, 7 Johns. (N. Y.) 470; Highland Co. v. Rhoades, 26 Ohio St. 411; Howard v. Indus. Sch., 78 Me. 230; Hughes v. Clyde, 41 Ohio St. 339; and see Martine v. Nelson, 51 Ill. 422; Loyd's Building and Buildings 93.

⁶ Highland Co. v. Rhoades, 26 Ohio St. 411.

⁷ Taylor v. Fox, 16 Mo. App. 527; *semble*, Kimberly v. Dick, 41 L. J. Ch. 38 [1871].

⁸ Safety Insulated Wire and Cable Co. v. Baltimore (C. C. A.), 66 Fed. Rep. 140.

⁹ *In re* Protestant Epis. School, 58 Barb. (N. Y.) 161.

* See Law of Contracts, Secs. 88-97, *supra*.

a return of the deposit made by him with his bid, after he had notice that his bid had been rejected, and after he had protested against reletting the work, and the commissioner had readvertised the proposals for bids, thereby waive his right to insist upon performance of the obligation created by the acceptance of his bid.¹

An acceptance of a bid in writing which states that a contract shall subsequently be entered into is a conditional acceptance, and binds both the bidder and the acceptor.² Though the acceptance, may not, with the bid, constitute the contract, it has been held to give the bidder a legal right to the contract if he complies with the requirements imposed in the advertisement.³ An act passed by the legislature subsequent to the award of contract, but prior to its formal execution, changing and fixing the plans of the work, cannot affect the validity of the contract.⁴

It has been held that the fact that it was contemplated that a written agreement should be executed did not prevent the proposal and its acceptance from becoming a complete contract.⁵ When it is announced in the advertisement that a formal contract will be prepared and signed, or the proposal is made dependent upon such a contract being entered into, then the acceptance, it seems, does not create the contract; at least it has been held that the work might be abandoned altogether.⁶

Public officers and owners will save trouble if they always make the acceptance of a proposal conditional on the bidder signing a contract of the prescribed form and furnishing approved sureties for the execution and completion of the work.

Whether an acceptance of a proposal creates a contract, or whether it is a subsequent contract to be entered into, is a question of intention of the parties when the proposal was made and the acceptance communicated.⁷ If the acceptance be made "subject to the signing of a formal contract," or "subject to the preparation and approval of a written contract," it must be taken for what it says, and no different intention can be shown.⁸

If the bid be conditional, the condition must be performed before the contract can be completed.⁹

The fact that the owner or his architect said to one of the bidders, "You are the lucky man," has been held merely a recognition that he is the lowest

¹ *Lynch v. City of New York* (Sup.), 37 N. Y. Supp. 798.

² *Crossly v. Maycock*, L. R. 18 Eq. 180.

³ *Hughes v. Clyde*, 41 Ohio St. 339; *Lewis v. Brass*, L. R. 3 Q. B. D. 667; see also *The Guardians v. McLoughlin*, 4 Ir. Rep. C. L. 457 [1856].

⁴ *In re Protestant School*, 58 Barb. (N. Y.) 161.

⁵ *Adams v. United States*, 1 Ct. of Cl. 192.

⁶ *Municipal Sig. Co. v. Holyoke* (Mass.),

46 N. E. Rep. 387.

⁷ *Lewis v. Brass*, L. R. 3 Q. B. D. 667; *Crossly v. Maycock*, L. R. 18 Eq. 180.

⁸ *Winn v. Bull*, L. R. 7 Ch. Div. 29 [1877]; and see *Comm'rs v. Petch*, 10 Ex. 611, and *Spencer v. Harding*, L. R. 5 C. P. 561; *Mainprice v. Wesley*, 6 B. & S. 420. And see other English cases in *Emden's Law of Building*, etc., pp. 58, 59; but see *Eadie v. Addison*, 52 L. J. Ch. 80, 47 L. T. 543, *contra*.

⁹ *Howard v. School*, 78 Me. 230.

* See Secs. 171, 176, *supra*.

bidder, but not equivalent to awarding the contract to him.¹ And when the engineer informed a bidder in writing that his tender was accepted, and that intimation was confirmed by the directors of the company upon his attendance at one of their meetings, no document being executed accepting the tender in such a manner as to be binding at law, and the project was afterwards abandoned, it was held that the contractor could not compel the company to execute a contract, nor could he recover from them the loss he had sustained in preparing for the works.²

A bid properly made under valid and regular proceedings and once accepted, and the contract awarded to the lowest bidder, is good always.³ A contract so made cannot be destroyed by the rescission of the ordinance by the council;⁴ but if the ordinance has not been legally passed, any and all proceedings under it are invalid, and a contract under such an ordinance gives a contractor no rights to recover damages for refusing him the work.⁵ A written proposal and an oral acceptance thereof have been held not to constitute a written contract.⁶ But a written bid and a verbal acceptance by a managing receiver, and a signing of the specifications and plans by the bidder and the company's architect, have been sustained as a binding contract.⁷ Proceedings which consist of opening bids and awarding the work, without stating the amount of the bids submitted, or the sum for which the work was awarded, have been held sufficient to authorize the contract.⁸

Where a contractor's bid for the construction of a building is accepted, and the terms of the building contract are left to be stated in a writing subsequently entered into by the parties, that writing is the highest evidence of the terms of the building contract.⁹

The proceedings of public officials in opening the bids and awarding contract is such business as should be overt and open to public inspection. Frequently, therefore, the bidders are invited to be present when the proposals are opened.

When the charter requires that bids shall be opened on the day named in the notice, or on such subsequent day as the council might adjourn to, and provides that the "council shall determine which proposal is most favorable," it does not require the determination of such question at the meeting at which the bids are opened.¹⁰

¹ *Leskie v. Haseltine*, 155 Pa. St. 98.

² *Jackson v. The N. W. Ry. Co.*, 1 Hall & Twelle R. 75 [1848].

³ *Lewis v. Brads*, L. R. 3 Q. B. Div. 667.

⁴ *Baird v. Mayor*, 23 N. Y. 254.

⁵ *Baird v. Mayor*, 83 N. Y. 254; but see *Carey v. E. Saginaw* (Mich.), 44 N.W. Rep. 168, [1890], where contract was not in writing and sealed, as charter required.

⁶ *Specht v. Stevens* (Neb.), 65 N.W. Rep. 879; accord, *Bruce v. Pearsall* (N. J.), 34 Atl. Rep. 982.

⁷ *Girard L. Ins. Co. v. Cooper*, 16 Supp. Ct. Rep. 879.

⁸ *Megrath v. Gilmore* (Wash.), 39 Pac. Rep. 131.

⁹ *Town of Hamilton v. Chopard* (Wash.), 37 Pac. Rep. 472.

¹⁰ *Lillenthal v. City of Yonkers* (Sup.), 39 N. Y. Supp. 1037; and see *People v. Yonkers*, 39 Barb. (N. Y.) 266. See also *Mayor v. Keyser* (Md.), 19 Atl. Rep. 706, and *People v. Croton Aq. Bd.*, 26 Barb. (N. Y.) 240.

If the bidder has made a mistake and withdraws his proposal after it has been accepted, he may be held liable to the owner for what the work costs in excess of his bid.¹ Fraud or false misrepresentations by the owner or his authorized agents as to the character of the work undertaken, and an immediate notification as soon as discovered by the bidder, will relieve him from his original offer, as it would also from the contract.²

The mere fact that a party is the lowest bidder, and knows that fact, does not constitute an award to him of such contract under an act regulating the letting of work upon competitive bids, which provides that "if the lowest bidder shall refuse or neglect, within five days after due notice that the contract has been awarded, to execute the same, the deposit made by him shall be forfeited to the city."³*

184. Bid to Furnish Materials.—If, in answer to an advertisement for proposals to supply goods, to furnish materials, or to perform work, a bidder submits a bid offering to furnish the materials or do the work in such quantities or at such times as may be ordered, which bid is accepted, it has been held that the bidder is bound to supply the goods or perform the work when ordered although there is no binding contract on the part of the acceptor to take or order anything, and that there is sufficient consideration for the bidder's promise.⁴ If this is good law and the bidder's offer cannot be recalled or revoked, contractors and materialmen will do well to limit their proposals as to quantity and time, so that they may not be compelled to carry a stock of materials, or hold themselves in readiness to perform such a contract, for an indefinite length of time.

If the dealer or manufacturer is bound to furnish materials when ordered, it would seem that there would be a reciprocal obligation on the part of the one inviting the bids to order from the bidder what materials he required or purchased during the period named. So it has been held.⁵ A contract to furnish stone "at such times and in such quantities as may be required" was construed to refer to the needs of the work or service.⁶

A contract to furnish materials in which the quantities were stated as "more or less," and it was agreed that the materials should be delivered in such quantities "as shall be directed by the treasurer and according to the specifications and the requirements of the treasurer under them," and pay-

¹ *Lewis v. Brass*, L. R. 3 Q. B. D. 667.

² *Martine v. Nelson*, 51 Ill. 422.

³ *Erving v. City of New York* (N. Y. App.), 29 N. E. Rep. 1101, *affirming* 16 N. Y. Supp. 612.

⁴ *Gt. Northern Ry. Co. v. Witham*, L. R.

9 C. B. 16 [1873].

⁵ *Levey v. N. Y. Central R. Co.*, 24 N. Y. Supp. 124.

⁶ *Mueller v. United States*, 19 Ct. of Cl. 581.

* The form of Instructions to Bidders has been made more comprehensive than ordinary work will require, but it is submitted that frequently circumstances exist where they all may have a bearing, and conditions will arise which may be met by the clauses here given.

If the circumstances do not require the use of all the clauses given, the engineer or architect may omit such clauses as seem unnecessary by and with the advice or consent of the company's or owner's legal adviser.

ments were "to be made upon the engineer's certificate that the quantities have been delivered as per requisition and in accordance with the specifications," the words *more or less* always following each statement of quantity, was held to be a contract for only what materials were needed, and that no damages could be recovered for not taking the quantities stated in the specifications.¹

If proposals are made for certain materials, as the stone in an old structure about to be torn down, specifying no limitations or qualifications, an unconditional acceptance thereof has been construed a contract for all the materials specified [stone].²

185. Form of Proposal for Public Work.

PROPOSAL

FOR THE CONSTRUCTION; ERECTION; FOR IMPROVING, REMOVING, AND BUILDING; TO FURNISH ALL THE LABOR, TOOLS AND MATERIALS; TO FURNISH AND DELIVER, TO EXAVACATE, ETC. ETC.....NEAR, OR ON, OR OVER.....STREET, WAY, OR RIVER AT..... CITY, TOWN OF....., COUNTY OF....., STATE OF..... COUNTRY.

To the Chief Engineer, Architect, or Surveyor.

To the Board or Commissioner of Public Works.

Dear Sir or Gentlemen.

We....., the President, Secretary, Treasurer, and General Manager of.....Company, a corporation duly authorized by act of Congress or Legislature....., 18...., to contract and to do such other business as is required under the annexed contract.

The undersigned do[es] hereby declare :

1. *Not in Arrears or Default.*—That I, [We or the.....Company,] am [are or is] not in arrears to the.....Company, City, or State, upon debt or contract or by default as surety or otherwise.

2. *Capacity to do Work.*—That I, [We or the.....Company or Firm,] have [has] been regularly engaged in contract work or in building or in the erection of.....of the class of work required by the annexed contract and specifications for....years, and that I [We or it] respectfully invite attention to the following works that have been erected by me [or us or the said.....Company], and respectfully refer to the following parties for whom I [We or it] have performed construction work: The New York and Brooklyn Bridge, erected 1870-1883, for the New York and Brooklyn Bridge Trustees, cost \$15,000,000; Office Building for The Manhattan Life Insurance Co., 16 stories, 67 ft. by 125 ft., 72 Broadway, New York, 1893; etc. etc.

3. *No Help from Engineer's Office.*—That this estimate and proposal submitted has been prepared without any assistance from any person belonging to, employed by, or holding office in the Engineering [Architectural] Department, or the Department of Public Works of the

¹ Collmeyer v. Mayor, 88 N. Y. 116.

² Thorn v. Comm'r, 82 Beav. 490.

4. *No Employee or Officer Interested.*—That no member or delegate , nor any person acting for or employed by the Department of Public Works of the City, [State, or United States,] nor any person appointed by virtue of any city ordinance, [legislative act, or act of Congress] relative to the work, is directly or indirectly interested in this proposal or in the supplies or works to which it relates, or in any portion of the profits thereof contrary to the ordinance or laws of the City, [State, or United States. . . .].

5. *Bidder is the only Person Interested.*—That I [We, the. Company,] am [are, is] the only party[ies] interested in this proposal or in the contract proposed to be taken; that it is made without any connection with any other person or persons making any proposal for the same work, and that it is in all respect fair and without collusion or fraud.

5'. *Bidder alone Interested.*—And I [We, or the. Company], of. City, ... County, ... State, do further declare that I [We or It] am [are or is] the only person[s], party or parties interested in this proposal, and that no other person than the person herein named has any interest in this proposal or in the contract proposed to be taken.

6. *Ordinance, Charter, or Act Examined.*—That I [We] have examined and am [are] familiar with the Ordinances. . . . , [Acts of Legislature, Act of Congress, or Charter of the City or Company,] mentioned in the Advertisement and Instruction to Bidders, annexed, and relating to the work in question, and will undertake to conform to such laws, ordinances, and charter.

7. *Locality Examined and Quantities Estimated.*—That I [We], with our Engineer, have personally examined the location of the proposed work, and have satisfied myself [ourselves] as to the amount and character of the work and materials necessary to complete the work according to the annexed plans, specifications, and contract.

8. *Terms and Prices.*—That I, [We] the undersigned, further declare that I [We] have carefully examined the annexed form of contract, prepared by., and that I [We] will contract to provide all necessary machinery, tools, apparatus, and other means for the construction and do all the work called for by the said contract and specifications and furnish all materials called for in the bill of quantities, contract, and specifications in the manner therein prescribed and according to the requirements of the Engineer, as therein provided, upon the following terms and for the following sums [prices], to wit:

Item (a) \$	Item (b) \$	Item (c) \$
.....		
.....		

8'. That I [We] [the said Company], undersigned, do hereby offer to perform the whole of the work and furnish all materials, labor, watchmen, implements, tools, and machinery of every description necessary for the perfect construction and completion of the work contemplated in the annexed specifications, in accordance with the plans, specifications, contract, etc., which have been examined by me [us] at the office of the Engineer, and to conform to all the conditions appended hereto at and for the prices given in the attached schedule.

Approximate Quantities.	Description.	Denomination.	Price.	
			[Written out.]	[Figures.]
	Slashing, clearing, close cutting, and grubbing.....	Per acre.....		\$ c.
2,000 cub. yds.	EXCAVATIONS, all kinds, in any soil, incl. ding all incidentals and refilling.....	Per cubic yd.		
500 cub. yds. . .	MASONRY, in abutment and wing walls, including newels, set in Portland cement	"		
420 cub. yds. . .	MASONRY, in piers for trestle-bents, set in Portland cement	"		
If required....	In 12-inch cedar piles	Per lineal ft.		
100 cub. yds. . .	In concrete foundations	Per cubic yd.		
If required....	In timber for platforms	Per M. B. M.		
147,000 lbs.....	Steel in main girders and wind bracing	Per lb.....		
4,800 lbs.....	Wrought-iron standards for side-walk guard.....	"		
2,000 ft.....	Wrought-iron gas-tube for side-walk guard	Per foot.....		
11,800 lbs.....	Cast-iron handrail standards	Per lb.....		
152,000 F.B.M.	Timber decking	Per M. B. M.		
1,500 lbs.....	Sheet lead	Per lb.....		
8	Ornamental lamps, fixed	Each.....		
	Etc., etc., etc.			

9. *Special Terms and Prices.*—For all lumber used for sheeting and shoring, but left in place by order of the Engineer, the sum of..... per M feet, B. M.

For all extra work not included in the above items, by written order of the Engineer, the various prices set against the following several items:

Laborers.....	per day.
Single teams and drivers.....	per day.
Double teams and drivers.....	per day.
First-class masons.....	per day.
" " blacksmiths.....	per day.
Helpers.....	per day.
Foremen.....	per day.

For all extra work done and extra materials furnished by written order of the Engineer, not contemplated by this contract, the actual cost of said work and materials, as determined by the Engineer, plus fifteen (15) per cent. of said cost.

For all earth excavation of extra depth below grade, made by written order of the Engineer, except....., the sum of.....per cubic yard.

10. *Prices Include Everything.*—The above prices are to include the cost of doing all other work required by the contract and specifications or appertaining thereto.

10¹. *What Prices Include.*—The prices named are to include [cover] any and all work and materials that may be necessary to connect the work done with the adjoining work in a proper and workmanlike man-

ner, and in accordance with the plans, sections, and profiles prepared by the Engineer, and according to the terms of the contract and specifications attached, and the rules and regulations of the city, and under the direction and to the satisfaction of the Engineer, at the following rates, to wit:

10^a. *Prices Include Everything.*—The prices are to cover all expenses of every kind involved in, or incidental to, the completion of the contract, including any claims that may arise through delay from any cause in the performance of the work thereunder.

11. *Delivery.*—The prices are also to include the delivery of all materials on the wharf, or at the works, or at the structure, etc., on the. street, river, way, of the city of.....

12. *Samples Submitted.*—The bidder pursuant to the [annexed] instructions to bidders has prepared and herewith submits the following samples of materials and workmanship, the equal of which he will undertake to furnish throughout the execution of the work according to the contract and specifications. The samples are marked as follows: Sample 302 C.—Rock-faced Gray Limestone, 16" × 20" × 36". Sample 12 B.—Test Specimen, Basic Open-hearth Steel; Tensile Strength.....lbs; Reduction Area.....per cent; Elongation..... ins. in..... inches. Etc....., etc....., etc.

13. *Commencement of Work.*—I [We, the said.....Company], undersigned, will commence the work within ten days of the execution of the contract, and will prosecute the work to completion within the limit of time hereinafter named, in accordance with the requirements and provisions of the contract.

14. *Time to Complete.*—I [We, the.....Company] will require working days from the date of commencement to complete the whole of the work.

15. *Liquidated Damages.*—I [We, the.....Company] will pay the sum of dollars, liquidated damages, for each and every day that the contract is unfulfilled after the time mentioned for completion in the contract, the....day of....., 189..

16. *To Keep in Repair.*—I [We, the.....Company] undersigned, also agree to maintain in complete repair the whole of the works undertaken in this contract, and all roads, ways, streets, etc., interfered with or required to be rebuilt in the construction of the works, for a period of twelve months after the complete performance of this contract.

17. *Limit of Awards.*—Notwithstanding I [We, the.....Company] have proposed for several sections of the work advertised, it is my [our] wish that the total work awarded to me [us] shall be limited to.....dollars, and to be not less than.....dollars.

18. *Certified Check.*—Accompanying this proposal is a certified check [accepted bank cheque] for the sum of.....dollars [\$], as called for in the advertisement, instructions, or notice to bidders; and it is hereby agreed and understood that in case of refusal or failure to execute the contract and furnish the bond hereto annexed with the..... City [Company or State], within ten days after the acceptance of this proposal, the said check shall be forfeited to the said City [Company or State] as liquidated damages for such failure, and that all contract rights acquired by the acceptance of this proposal shall be forfeited, and all obligations assumed by the parties in connection there-

with shall be released and mutually rescinded; that if this proposal be rejected or the contract awarded to another party the certified check shall be returned to the undersigned within three days after such rejection.

18'. *Certified Check.*—Accompanying this proposal is a certified check for.....dollars [\$], which shall become the property of the City [Company or State] of, if in case this proposal is accepted by the said City [Company or State], or its authorized officers the undersigned shall fail or refuse to execute the contract and furnish a bond, according to the requirements of the instructions to bidders, hereto appended, within the time provided by said notice; otherwise the said check shall be returned to the undersigned within three days after the date set for opening the bids.

19. *Sureties Offered.*—In case this proposal is accepted by the.....
Messrs. resident
of and resident
of are offered as sureties for the faithful execu-
tion of the contract.

19'. *Consent to Become Surety.*—If this proposal be accepted and the contract awarded to me [us] [the.....Company] I [we, the.....Company] hereby agree to furnish approved sureties for the construction of the said works and to execute the contract and bond therefor in the form attached, and according to the general conditions forming a part thereof, within ... days after being notified so to do by the engineer; and in the event of default or failure on my [our] part in any particular or, for any cause whatever, the said.....shall be at liberty to accept the next lowest bid or any bid, or he [it] may readvertise for proposals, and I [we] hereby agree to pay to the said.....the difference between the above proposal and any greater sum which they [it] may be obliged to pay by reason of such default or failure, including the cost of any advertisement for new bids, and to pay the attorney of the said.....the cost of the preparation of such contract and bond, which is hereby fixed at ten dollars; and to indemnify and save harmless the said corporation and officers from loss and damage, cost, charges, and expense, with which they may suffer or be put to by reason of any such default or failure.

And I [we] propose Mr.....of
.....and Mr.....
.....of.....as sureties
who are willing to become bound with.....for the due performance
of the said contract.

Signature {

 Address {

We, the undersigned, do hereby offer [consent] to become bound for the above-named in the annexed Bond for the fulfillment of any contract for any of the works named in the annexed specifications which may be awarded to..... at the prices herein above set forth.

Signature of Sureties {

20. *Signatures, Addresses, and Date.*—Signature of Person, Firm, or Corporation making proposal :

.....Post Office Address.....
.....Dated.....

The full names and residences of all persons interested in this proposal [as principals] are as follows :

.....
.....

[NOTICE.—Give Christian names as well as surnames, and, in case of corporations, sign name of President, Treasurer, and Manager. The names of bidders will be made public ; but the names of all parties interested with them, being required for the information and guidance of the Board only, will not be made public.]

21. *Oath as to Statements.*—

City of

County of

State of

The undersigned, ...

being duly sworn, say that the several declarations and matters stated in this proposal are in all respects true.

[Signed].....

Residence.....

Subscribed and sworn to before me, this.....

day of.....A.D. 189..., at.....

....., *N. P. or J. P.*

[NOTICE.—This affidavit must be made by the person or persons bidding for the contract ; in case of a firm, by each and every member of the firm.]

22. *Bond for Execution of Contract.*—

Know all Men by these Presents,

That we are held and firmly bound unto the City of [State or Company] in the sum of.....dollars, lawful money of the United States of America, to be paid to the said The City of..... [State or Company], its successors and assigns, as liquidated damages, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the.....day of..... in the year one thousand eight hundred and ninety.....

Whereas, the said..... ha..... made a proposal to the City of [State or..... Company],..... bearing date the.....day of.....one thousand eight hundred and ninety....., and annexed hereto :

Now the condition of this obligation is such that if the said.....

shall, within ten days after the acceptance of the said proposal, well and truly execute the contract in accordance with said proposal, then this obligation shall be of no effect ; otherwise it shall remain in full force and virtue.

(Seal.)

(Seal.)

Signed and sealed in }
the presence of }

CHAPTER VII.

BIDS AND BIDDERS. WORK FOR PRIVATE PARTIES.

186. Lowest Bidder on Private Work. Owner may Adopt such Formalities and Make such Requirements as he Pleases.—Advertisement and proposal for private work are less formal and ceremonious than for public work, but many of the instructions, conditions, and stipulations given hereinbefore, with slight modifications, will do for private work if an owner desires to have public competition. It is more usual for a private owner, and even companies, to invite by letter such contractors and builders as they desire to entertain proposals from, to make bids. The expense of printing blank forms of proposals, specifications, and contracts is then saved, the engineer or architect keeping on file at his office, and open for the inspection of the bidders, the specifications and plans and general contract form to be used, with his estimate of the quantities. Sometimes three or four sun-print copies are made to enable more bidders to estimate or to give a few bidders more time to make their estimates.

The forms presented heretofore for public work are so elaborate and complete that the author deems it hardly necessary to submit a new set of forms for private work, but recommends that the clauses of the public form be used in so far as the owner and architect consider it pertinent and desirable, such modifications being made as seem necessary to make it conform to private needs and ends. The important questions that arise in advertising for public work and the award of the contract, and all questions as to what the owner or proprietor may or may not require, what he may include, whether or no he secures competition, and to whom or how he awards the contract do not arise in private work, except as they have been made matters of agreement between the owner and the bidders.¹ The owner can adopt his own methods in soliciting, receiving, and accepting proposals; can make whatever rules, conditions, and restrictions he sees fit; can make any amount of work and trouble for the contractors who in good faith go to the expense of preparing estimates, plans, and specifications; and may then award them or not, as he pleases, and to whom he pleases. The owner may, it seems, appropriate and make use of the fruits of their labors with-

¹ English cases in Emden's *Law of Building*, etc., p. 59, *note*.

out any thoughts of recompense, without a grain of remorse, and if it be a church society, without sacrificing a pennyweight of piety.

187. In Absence of Agreement or Pledge, Owner may Exercise his Own Preference.—As just stated, the rights of the lowest bidder on private work are confined to those created by agreement. He has no rights except such as have been agreed to by the owner, and if there is no contract expressed or implied, then the lowest bidder has no claims to the contract, and the proprietor is under no obligation to award it to him. In the absence of a pledge or definite understanding between the parties that the lowest bidder shall be employed to do the work, the owner may exercise his own judgment and give personal preference in determining whose offer he shall accept. He is not liable to one whose offer is rejected for the time and labor employed by him in examining the plans and specifications to prepare himself to make his offer.¹ The owner may inquire into the fitness, skill, integrity, and sobriety of the respective bidders.²

To establish any claim against private parties an agreement to award the contract to the lowest bidder must be clearly proven.³ The agreement need not, it seems, be in writing, and its proof may be largely established by the acts of the parties and by supplemental promises.⁴ If there is anything in the invitation for proposals that shows an undertaking to accept the offer of the lowest bidder, then the person inviting the bids may be holden to his agreement,⁵ and the testimony of other bidders may be admitted to show the statements made to them by the architect and the owner respecting the terms under which the bids were made.⁶

The mere fact that valuable services are rendered does not raise a liability on the part of the person for whom they were executed, even though at his request, if the circumstances are such as to rebut the inference that compensation was expected to be received or paid. In the case of architects putting in bids for the construction of buildings or of engineers for the construction of bridges or other works, and furnishing plans and specifications therefor, unless the parties calling for bids expressly agree to pay for such plans and estimates, there can be no contract implied, for there is nothing in the circumstances that shows that pay was expected to be received or given, except through the possible benefit to the parties performing the service in acceptance of their bids.⁷

¹ *Topping v. Swords*, 1 E. D. Smith, 609 [1852]; *see also Reusch v. Amer. Brewing Co. (La.)*, 11 So. Rep. 719.

² *Le-kie v. Hasetline* (Pa. Sup.), 25 Atl. Rep. 886; *State v. Bd. of Ed.*, 42 Ohio St. 374; *and see Spencer v. Harding*, L. R. 5 C. P. 561.

³ *Doyle v. Dusenberg*, 74 Mich. 79.

⁴ *McNeil v. Boston Chamber of Commerce* (Mass.), 28 N. E. Rep. 245 [1891].

⁵ *Roscoe's Digest of Building Cases* 48; *and see Allen v. Yaxall*, 1 C. & K. 315;

and see Reusch v. Amer. Brew. Ass'n, 44 La. Ann. 1111, and *supra*.

⁶ *Huckstein v. Kelly & Jones* (Pa. Sup.), 25 Atl. Rep. 747.

⁷ *Wood's Master and Servant* (2d ed.) 103; *Palmer v. Haverhill*, 98 Mass. 487, in which the contractor was the lowest bidder, but all bids were rejected, and it was held he could not recover; *Topping v. Swords*, 1 E. D. S. (N. Y.) 609; *Buck v. Amidon*, 41 How. Pr. (N. Y.) 376; *Noury v. Lord*, 2 Keyes (N. Y.) 617.

If a contractor will protect himself against the loss of time and labor in preparing proposals for work, he should insist upon an agreement with the proprietor that the lowest bidder shall be awarded the contract. If he does not do this he may expect to make fruitless bids for work, and his time and trouble be employed simply to give the proprietor a basis on which to let the work to some favorite contractor or builder previously selected.

188. Implied Agreement to Remunerate Bidder for His Labor or to Award Contract to Lowest Bidder.—It has been intimated that if bidders had had no knowledge that the competition was not in good faith, and could show that bids were invited solely for the purpose of making the lowest possible contract with a party previously chosen, they could recover for their time and labor spent in preparing the bids. It would be almost out of the question to establish such proofs, and even then it would be doubtful if an implied contract would arise in favor of the contractor.¹

Acceptance of a bid has been inferred and a contract implied from an owner's conduct, in connection with evidence of a usage in the building trade to accept the lowest bidder. So when builders were present at the opening of the bids and it was generally understood that the lowest bid was to be accepted, because nothing was said or intimated by the owner or his agents to the contrary, and, acting on that assumption, the unsuccessful bidders dined at the successful bidder's expense, and all parties by their conduct showed apparently the same understanding, it was held to amount to an acceptance of the bid.² The terms of the proposal must be definite and expressed so that they show the terms of the contract, and the subject-matter must be described. Instructions or directions to the bidder to go on and do the work have been held an acceptance when he had made a proposal to do the work as specified.³

When an agreement is alleged between private persons that the lowest bidder shall have the contract, but it is not proven, and the contractor's bid is an unsigned memorandum, without reference to any particular building and without names of parties or specifications, and no mutuality of obligation is shown, the contractor has no rights.⁴ An intimation in the written acceptance of a tender that a contract will be afterwards prepared does not prevent the parties from becoming bound to perform the terms of the tender and acceptance, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing in formal language the agreement already arrived at.⁵ If, however, it can be gathered from the tender and

¹ 2 The Engineering Magazine 482.

² Pauling v. Pontifex, 20 Law Times 126 [1852].

³ Burch v. Hotel Co., 7 Mo. App. 583.

⁴ Doyle v. Dusenburg (Mich.), 74 Mich. 79 [1889].

⁵ Lewis v. Brass, L. R. 3 Q. B. D. 667; but see Lefurgy v. Stewart (Sup.), 23 N. Y. Supp. 537, where the price of stone named in bid was held to be the fair and reasonable value of the stone, coming precisely within the bid.

* See also Sec. 183, *supra*.

acceptance that an agreement was made subject to the preparation and approval of a formal contract, then there is no agreement independent of that stipulation, and it is by the formal contract that the parties will be bound.¹

When proposals for a contract are in writing and executed by the parties, *i. e.*, have been made and accepted, the terms of the contract being in all respects definitely understood and agreed upon, and either party refuses to execute the contract, it seems he is liable on the breach of his agreement for the same damages as would be recoverable for an entire refusal to perform the contract after its execution in writing.² When, however, the document was not executed, accepting the tender in such manner as to be binding at law, the engineer having merely informed the bidder that his proposal was accepted, which intimation had been confirmed by the directors of the company at a meeting at which the bidder was present, and the project was afterward abandoned, it was held that the contractor could not compel the company to execute the contract, or recover from it the loss he had sustained in preparing to do the work.³

Plans and specifications referred to in a call for bids are treated as incorporated into and forming a part of the contract as well as other matter referred to in the call.⁴

A proposal to receive bids for certain things to be sold, specifying no limitation or qualification, constitutes a contract to include the whole of such thing.⁵ This case arose out of the sale of stone contained in an old bridge, and would apply with equal force to the sale of materials of an old building.[†]

¹ Winn *v.* Bull, L. R. 7 Ch. D. 29 [1877];
Com'rs *v.* Fetch, 10 Ex. 611.

² Pratt *v.* Hudson River R. Co., 21 N. Y.
305 [1860]; and see Highland Co. *v.*
Rhoades, 26 Ohio St. 411.

³ Jackson *v.* The N. W. Ry. Co., 1 Hall

& Twelle 75 [1848].

⁴ Woods Law of Master and Servant (2d
ed.) 164; citing Windhorst *v.* Deeley, 2 C.
B. 253.

⁵ Verm. *v.* Commissioners, 32 Beav. 490
[1863].

† Secs. 189-199 are omitted.

PART III.

ENGINEER'S AND ARCHITECT'S EMPLOYMENT.

CHAPTER VIII.

ENGAGEMENT OR EMPLOYMENT OF ENGINEER OR ARCHITECT.

PERFORMANCE OF SERVICE, TERM OF SERVICE, DISMISSAL OR DISCHARGE, AND EXTRA WORK.

200. Contract of Employment.—A contract of employment must contain all the essentials of a contract, just the same as all other contracts. It can not be terminated, except for good cause, until the term of service has expired. If the employment be for a year, a month, or a day, it cannot be terminated before the year, month, or day has expired, without sufficient reason for the act. If no term of service has been agreed upon, the employee may be discharged at any time; or even ejected by force, if necessary.¹

201. Term of Service.—If the service is to continue so long as the employer is satisfied, he may dismiss the employee at any time and without giving any reason,² and a contract for a year, unless sooner terminated, does not mean that either party can terminate the service without just cause.³

A contract to give an employee steady and permanent employment is not void as against public policy, in the absence of any showing that the employee is not able or competent to do such work as the employer may be in a position to give him.⁴ So if an employer, in settling with an employee for injuries, agree to employ him at a certain salary for life, or during his ability and disposition to perform the duties required, he will be liable for prospective damages if he discharge the employee.⁵

¹ De Briar v. Minturn, 1 Cal. 450; Niagara F. Ins. Co. v. Whittaker, 21 Wis. 329; Donaldson v. Williams, 1 Cr. & M. 345; Mackay v. Ford, 29 L. J. Ex. 404.

² Spring v. Ansonia Clock Co., 24 Hun (N. Y.) 175; Glyn v. Miner, 27 N. Y. Supp. 341; Evans v. Bennett, 7 Wis. 404; Alexis Stoneware Mfg. Co. v. Young, 59

Ill. App. 226; Daveny v. Shattuck, 9 Daly (N. Y.) 66.

³ De Briar v. Minturn, *supra*; Niagara F. Ins. Co. v. Whittaker, *supra*.

⁴ Penna. R. Co. v. Dolan (Ind. App.), 32 N. E. Rep. 802.

⁵ Brighton v. Lake Shore & M. S. Ry. Co. (Mich.), 61 N. W. Rep. 550; 70 N. W.

A contract of employment for an indefinite period may be terminated any time by either party,¹ and one for not more than six months, or not to exceed six months, is for an indefinite period.²

An agreement to employ a person permanently is nothing more than employment to continue indefinitely, or until one or the other of the parties, for some good reason, desires to sever the relation of employer and employee.³ An agreement "to come to the permanent service of a company" would probably receive the same construction. A contract of employment at certain wages, so long as the works of the employer are kept running or until the employee shall see fit to quit, is not void for uncertainty.⁴

The compromise of a disputed claim for personal injuries to an employee is a sufficient consideration for a railroad company's agreement to retain such employee at a specified salary during his natural life, or his ability to do the work, though the continuance of the service be optional with the employee.⁵

If the terms of employment adopt a certain length of time, as a month, or a year, for the estimation of wages, it raises a strong presumption that the term of service was for the period mentioned. Therefore a contract at \$.... per year is presumably for a year; at a monthly rate, for a month;⁶ but the presumption is not conclusive in the absence of other evidence. It alone, will not fix the period.⁷ Such a contract is incomplete and ambiguous, and parol evidence of the surrounding circumstances, the situation of the parties at the time the contract was made, etc., may be admitted to assist the court in interpreting its meaning.⁸ Contracts for a year's employment, to begin at some day in the future, which *cannot* be completed within a year are void and worthless unless they are in writing, not being made in accordance with the requirements of the Statute of Frauds.[†]

A contract of employment, at a salary per year and a certain share in the net profits of a firm, does not make the engineer a partner in the firm.⁹

Under an employment for an indefinite period at a specified sum per month, which service continued for a number of years without interruption, the contract is continuous, and the Statute of Limitations does not begin to run until service ends.¹⁰ The terms of a yearly contract for services will be

Rep. 432; *Penna. R. Co. v. Dolan*, *supra*; and see *Pierce v. Tenn. C. I. & R. Co.* (Ala.), 19 So. Rep. 23.

¹ *Greenburg v. Early*, 23 N. Y. Supp. 1009.

² *Campbell v. Jimenes*, 27 N. Y. Supp. 351.

³ *Lord v. Goldberg* (Cal.), 22 Pac. Rep. 1126; *Carling v. Carr* (Mass.), 46 N. E. Rep. 117.

⁴ *Carter White Ld. Co. v. Kinlin* (Neb.), 66 N. W. Rep. 536.

⁵ *Stearns v. Lake Shore & M. S. Ry. Co.*

(Mich.), 71 N. W. Rep. 148 [1897].

⁶ *Kellogg v. Citizens' Ins. Co.* (Wis.), 69 N. W. Rep. 362; 14 Amer. & Eng. Ency. Law 762.

⁷ 14 Amer. & Eng. Ency. Law 762; *Fuller v. Peninsular, etc., Wks.* (Mich.), 69 N. W. Rep. 492; *Haney v. Caldwell*, 35 Ark. 156; *Martin v. N. Y. Life Ins. Co.* (App.), 42 N. E. Rep. 416.

⁸ *Porter v. Curtis* (Iowa), 65 N. W. Rep. 824.

⁹ *Ah How v. Furth* (Wash.), 43 Pac. Rep. 639.

* See Secs. 124-125, Parol Evidence, *supra*.

† See Statute of Frauds, Sec. 105, *supra*.

presumed to continue from year to year, so long as the employment lasts, unless the contrary is shown; and in the absence of sufficient evidence to show a change in the terms of employment, proof of the original contract will limit the right of recovery to the yearly salary at the original rate.¹

202. Dismissal or Discharge of an Employee.—Mr. Smith, in his work on Master and Servant, has named the following causes which may justify the discharge of a servant before his term of service has expired: (1) Willful disobedience of any lawful order of the master. (2) Gross moral misconduct, whether pecuniary or otherwise. (3) Habitual negligence in business or conduct calculated seriously to injure the master's business. (4) Incompetence or permanent disability. For convenience the author will adopt the same order of treatment.

203. Willful Disobedience of Any Lawful Order of the Employer.—It must not be taken that every breach of discipline or discourtesy can be made an excuse for discharging an employee. If the employer is unreasonable in his orders or commands, the employee is not bound to obey them, but he must be sure that they are unreasonable. A refusal to work at one's trade on Sunday,² or to work at unseasonable hours,³ when the circumstances or nature of the work does not make it necessary or reasonable to so work; or disobedience of orders in matters not material to the employment,⁴ or that involves no serious consequences and which is not willful, in the sense of being perverse, insubordinate, or unreasonable, which question is for a jury;⁵ or slight discourtesies, hasty words, and occasional exhibitions of irritation, or even ill-temper, especially where there are many petty causes of annoyance and irritation in the business,⁶ or where the employer exhibits impatience and irritation toward the employee without just cause,⁷ is not sufficient cause for discharging the employee.

If the servant is disrespectful in his conduct,⁸ or his deportment and disposition are such as to injure the custom and business of the employer, or he is insubordinate and ignores his employer's feelings and proper authority,⁹ or he uses obscene and improper language while attending to his duties, especially when the owner does not use such language,¹⁰ or his conduct towards agents sent by his employer to inspect his work is rude and reprehensible,¹¹ the employer will be justified in discharging the employee.

It is not a breach of a traveling salesman's contract for him to go to a

¹ Mears v. O'Donoghue, 58 Ill. App. 345.

² Jacquot v. Bourra, 7 Dowl. 348.

³ Koplitz v. Powell, 56 Wis. 671.

⁴ Hamilton v. Lowe (Ind.), 43 N. E. Rep. 873.

⁵ Cases collected, 14 Amer. & Eng. Ency. Law 789; see Pape v. Lathrop (Ind. App.), 46 N. E. Rep. 154.

⁶ Leatherby v. Odell (N. C.), 7 Fed. Rep. 642.

⁷ Forsyth v. Hastings, 27 Vt. 646 [1855]; Weaver v. Halsey, 1 Ill. App. 558; 14 Am. & Eng. Ency. Law 789.

⁸ Ralley v. Lanahan, 34 La. Ann. 426.

⁹ Leatherby v. Odell, 7 Fed. Rep. 642.

¹⁰ Weaver v. Halsey, 1 Ill. App. 558; 14 Am. & Eng. Ency. Law 789.

¹¹ Lalonde v. Aldrich (La.), 6 So. Rep. 28 [1889].

place off his route to spend Sunday with his family, where it does not seriously interfere with his compliance with his contract.¹

When the employer claims that the employee's misconduct has caused a diminution in his business, it may be shown that the decrease was caused in whole or in part by rumors affecting the employer's character and conduct.² The refusal of a traveling salesman to obey the orders of his employer requiring him to report by letter daily has been held sufficient excuse for his discharge.³ It seems a city salesman may properly refuse to go into another state to sell goods, nothing having been said at the time of his employment as to the place he should work.⁴

204. Gross Moral Misconduct, Pecuniary or Otherwise.—In any position it is probable that a criminal act would be sufficient to warrant an employer in getting rid of a servant, and without paying him his wages, too.⁵ Thieving, stealing, or embezzling the master's property has frequently been held a good cause for immediate dismissal,⁶ without notice, even though notice was required by the contract of employment,⁷ and without paying him any wages;⁸ but in the absence of deception, concealment of facts, or fraud, by which the employee has induced the employer to hire him, it seems that dishonest and fraudulent conduct with a former employer will not be a ground for dismissal,⁹ although the discovery that the employee is a drunkard will warrant the master in repudiating a contract of employment before the term of service has begun.¹⁰ Robbing a third party,¹¹ fraudulent conduct towards the employer,¹² taking bribes from subordinates to obtain favors,¹³ or accepting gratuities for conniving at a breach of regulations which he was to enforce;¹⁴ or unchaste and licentious conduct in a domestic servant, or in connection with the duties of one's service in any capacity,¹⁵ each and all have been held sufficient cause for dismissal.

The question whether a servant was rightfully discharged must depend upon the nature of the services which he was engaged to perform, and his dismissal must be in some way connected with the duties of that service.¹⁶ Drunkenness has been held a justifiable cause for discharge,¹⁷ if it is a habit,¹⁸ but not unless the duties of the service are affected thereby.¹⁹ Tat-

¹ *Milligan v. Sligh Fur. Co.* (Mich.), 70 N. W. Rep. 133.

² *Vinson v. Kelly* (Ga.), 25 S. E. Rep. 630.

³ *McCain v. Desnoyers*, 2 Mo. App. Rep. 896.

⁴ *Berriman v. Marvin*, 59 Ill. App. 440.

⁵ 14 Amer. & Eng. Ency. Law 783.

⁶ *Brown v. Croft*, 6 C. & P. 16, *note*; *Libhart v. Wood*, 1 Watts & S. 265.

⁷ *Smith's Master and Servant* 143.

⁸ *Cunningham v. Foublanque*, 6 C. & P. 49.

⁹ *Andrews v. Garstin*, 31 L. J. C. P. 15.

¹⁰ *Nolan v. Thompson*, 11 Daly (N. Y.) 314; *Johnson v. Gorman*, 30 Ga. 612.

¹¹ *Libhart v. Woods*, 1 Watts & S. 265; *Trotman v. Dunn*, 4 Camp. 211.

¹² *Singer v. McCormick*, 4 Watts & S. 265-266; *Horton v. McMurtry*, 5 Hurst & N. 667.

¹³ *Engel v. Schooherr*, 12 Daly (N. Y.) 417.

¹⁴ *Bogg v. Pearse*, 10 C. B. 534.

¹⁵ *Smith's Master and Servant* 143, *and cases cited*; *Drayton v. Reid*, 5 Daly (N. Y.) 442.

¹⁶ 14 Amer. & Eng. Ency. Law 789.

¹⁷ *Smith's Master and Servant* 144.

¹⁸ *Cases in* 14 Amer. & Eng. Ency. Law 788.

¹⁹ 14 Amer. & Eng. Ency. Law 788.

ting or disclosing to others the employer's business and secrets,¹ or disclosing the accounts of one company to another,² or revealing professional secrets of the employer,³ or the act of advising or inducing co-employees or apprentices to quit the master's service,⁴ or the act of plundering or poaching on the premises on which a workman is at work,⁵ is, each and any, a good reason for the employer to discharge the employee.

Claiming to be a partner and thus denying that one is an employee,⁶ or seeking to secure the patronage of the employer's clients or patrons to himself,⁷ or entering into negotiations for carrying on the same business as the employer is engaged in,⁸ will justify the employer in terminating the employment forthwith. The same was held when the employee engaged in a business or calling the tendency of which was to injure the employer's business,⁹ and when he dealt with certain merchants or tradesmen named by his employer.¹⁰

The right to discharge an employee, if at any time the employer "feel satisfied that the employee is incompetent," must be exercised in good faith.¹¹ His dissatisfaction must be genuine.¹² If the employer admits the contract of employment, the burden is on him to show cause for discharge.¹³

An employee may have a right of action against a third person who maliciously procures his discharge, though the employer violates no legal duty in discharging him.¹⁴ Railway companies, combining for the purpose of preventing employment by each other of discharged employees, are liable to a discharged employee who is prevented by them from procuring employment.¹⁵ A "boycott" by the members of trades unions or assemblies is unlawful, and may be enjoined by a court of equity.¹⁶

205. Habitual Negligence,¹⁷ or Conduct Calculated to Injure Master's Business¹⁸—This heading opens the broad question of "What is attention to business?" which cannot be answered generally, but must depend upon the circumstances of each case. It has been held that the *absence* of an overseer of a plantation for one day (presumably without good excuse), war-

¹ *Beeston v. Caller*, 2 C. & P. 607; *Drayton v. Reid*, 5 Daly (N. Y.) 442; *Green v. Brooks* (Cal.), 22 Pac. Rep. 849; *Fillieul v. Armstrong*, 7 A. & E. 557.

² *The East Anglian Ry. Co. v. Lythgoe*, 2 L. M. & P. 221; and see *Davenport v. Hulme* (Super.), 32 N. Y. Supp. 803.

³ *Mercer v. Whall*, 5 Q. B. 447.

⁴ *Turner v. Robinson*, 5 B. & Ad. 789.

⁵ *Read v. Dunsmore*, 9 C. & P. 588.

⁶ *Amor v. Fearon*, 9 A. & E. 548.

⁷ *Mercer v. Whall*, 5 Q. B. 447.

⁸ *Hobson v. Cowley*, 27 L. J. Exc. 205.

⁹ *Many cases*, 14 Amer. & Eng. Ency. Law 789.

¹⁰ 14 Amer. & Eng. Ency. Law 790.

¹¹ *Smith v. Robson* (N. Y. App.), 42 N. E. Rep. 677.

¹² *Crawford v. Mail and Express Pub. Co.* (Sup.), 41 N. Y. Supp. 325; but see *Alexis S. Mfg. Co. v. Young*, 59 Ill. App. 226.

¹³ *Mulligan v. Sligh Fur. Co.* (Mich.), 70 N. W. Rep. 133 [1897]. As to meaning of "incompatibility" and "unsuitableness," see *Gray v. Sheppard* (N. Y. App.), 41 N. E. Rep. 500.

¹⁴ *Dannerberg v. Ashley*, 10 Ohio Cir. Ct. Rep. 558.

¹⁵ *Mattison v. Lake Shore & M. S. Ry. Co.* (Com. Pl.), 2 Ohio N. P. 276.

¹⁶ *Oxley Stave Co. v. Coopers' International Union of North America* (C. C.), 72 Fed. Rep. 695.

¹⁷ *Newman v. Reagan*, 63 Ga. 755; *Callo v. Brouncker*, 4 C. & P. 518.

ranted his discharge,¹ and surely the position of an engineer as superintendent or chief inspector of large works would be regarded of equal importance.² The absence of a teacher for two days after vacation, no injury having been shown to result, will not justify his discharge.³

Illness for considerable time will release the employer from his contract of employment.⁴ The sickness of a timekeeper for fifteen days, together with the fact that he did not keep the employees' time correctly, is sufficient cause for dismissal;⁵ and imprisonment for two weeks was held sufficient cause.⁶ Under a contract of employment for a term of ten years it was held that the employee might recover his wages for a period of six months, during which he was too ill to attend to his duties, the company not having rescinded the contract, but having allowed it to remain in force and the employee to return to his work under it when he was sufficiently recovered.⁷ The same was held of a doorkeeper to the finance department of New York City, who was absent two years.⁸ A public officer on a fixed salary cannot be deprived thereof when his absence on account of sickness has been permitted. Long continued sickness may be a cause for removal from office, but until removed he is entitled to his salary.⁹

When a person is employed to perform certain duties it is presumed that he will attend to them personally. If the servant delegates such duties to another without notice to his employer it will justify his discharge.¹⁰ Such contracts include those for the services of engineers, architects, lawyers, physicians, playwrights, opera-singers, and even domestic servants. The contracts cannot be transferred nor assigned, nor can the services be delegated.¹¹ If a servant becomes disabled from performing the duties of his employment, the contract is thereby dissolved, and an agreement to pay the servant his wages if he would resign his employment is without consideration.¹²

206. Incompetence or Incapacity.—As described in previous sections, an employee is responsible for any misrepresentations as to his capacity, experience, skill, or training; and having made such representations, either expressed or implied, he is responsible for any damages due to the want of such skill and capacity. So, too, such misrepresentations may be a good ground for dismissing an employee.¹³ If the employee be unskillful or incompetent in the duties or work he has undertaken to perform, then he has

¹ *Ford v. Danks*, 16 La. Ann. 119; and see *Shaver v. Ingraham*, 58 Mich. 649; and *Drayton v. Reid*, 5 Daly (N. Y.) 442; *Shoemaker v. Acker* (Cal.), 48 Pac. Rep. 62.

² See *Wehrli v. Rehewoldt*, 107 Ill. 60.

³ *Filleul v. Armstrong*, 7 A. & E. 557.

⁴ 14 Amer. & Eng. Ency. Law 790.

⁵ *Miller v. Gidder*, 36 La. Ann. 201.

⁶ *Leopold v. Salkey*, 89 Ills. 413.

⁷ *Cuckson v. Stones*, 28 L. J. Q. B. 25.

⁸ *Devlin v. Mayor*, 41 Hun (N. Y.) 281.

⁹ *O'Leary v. Bd. of Ed.*, 93 N. Y. 541.

¹⁰ *Stanton v. Bell*, 2 Hawks (N. C.) 145; *Wise v. Wilson*, 1 C. & K. 662.

¹¹ 14 Amer. & Eng. Ency. Law 787; *Smith's Master and Servant* 152.

¹² *Prior v. Flagler* (Com. Pl.), 34 N. Y. Supp. 152.

¹³ *Austee v. Ober*, 26 Mo. App. 665.

not fulfilled his contract, and the employer will be justified in terminating the contract.¹ Yet unskillfulness on the part of an employee does not prevent him from recovering the real value of his services.²

The inability or incapacity of an engineer to conduct operations or carry the work imposed upon him may not arise alone from his want of skill or training, but from the quantity of the work or the burdens imposed upon him. It was therefore held that when an engineer of a single bureau of the department of public works of a great city had allowed himself to be loaded with all the work of the department, and in the performance of the added duties he developed a want of skill or ability as an engineer or an insufficient and slack control, it was sufficient ground for removing him from office; that while he might lawfully have declined the added duties imposed by the action of the chief of the department, yet having assented and assumed them, he could be held responsible for their proper performance.³

207. Condonation of Employee's Offense.—If an employee has been absent from his duties or work, or if he has been guilty of some breach of his contract,⁴ or he has indulged in hasty words or exhibitions of temper, and the employer has retained the employee with knowledge of the facts, he cannot thereafter complain nor make that instance a ground for his subsequent discharge.⁵ If the employee has been guilty of tortious or negligent acts, it seems that may warrant a subsequent discharge.⁶ Retention of service and payment of wages without protest, after knowledge of defective work done by an employee, is *prima facie* evidence of a waiver of the right to discharge him, or deduct from his wages on that account.⁷ It seems that the keeping of an employee whose skill and work was not equal to that contracted for until the busy season was over, it being very difficult to secure a competent substitute, is not of itself a condonation. What amounts to a condonation of a servant's offence is a question for a jury.⁸ The keeping of an employee after his work has become unsatisfactory is not a condonation of the acts causing dissatisfaction, when the contract provides that the employee may be discharged whenever his work proves unsatisfactory.⁹ A person cannot, by a decree of court, be compelled to retain another in his service.¹⁰

208. What Is a Discharge.—What amounts to a discharge of an employee is not always clear. It has been held that a request or demand for the employee's resignation amounts to a discharge.¹¹ A letter to a railroad

¹ Leatherberry v. Odell, 7 Fed. Rep. 641; Harmer v. Cornelius, 28 L. J. C. P. 85; Jenkins v. Betham, 15 C. B. 188.

² Cases, 14 Amer. & Eng. Ency. Law 781.

³ People v. Campbell, 82 N. Y. 247 [1880].

⁴ 14 Amer. & Eng. Ency. Law 778-791.

⁵ Hamilton v. Love (Ind.), 48 N. E. Rep. 878.

⁶ Stoddard v. Treadwell, 26 Cal. 294.

⁷ Tickler v. Andrae Mfg. Co. (Wis.), 70 N. W. Rep. 292.

⁸ McMurray v. Boyd (Ark.), 25 S. W. Rep. 505; Leatherberry v. Odell (N. C.), 7 Fed. Rep. 642.

⁹ Alexis St. Mfg. Co. v. Young, 59 Ill. App. 226.

¹⁰ Reid Ice Cream Co. v. Stephens, 63 Ill. App. 834.

¹¹ Jones v. Graham, etc., Co., 51 Mich. 539.

superintendent informing him that another had been instructed to superintend everything, and adding, "I presume you will prefer to retire by means of resignation. It is hereby understood that the same is accepted, and you will please telegraph me of its transmission. Please confer with M., the V. P., in turning over the papers in the superintendent's office," was held to operate as a positive and preëemptory dismissal; and a letter of resignation written in obedience or at the suggestion of the employer does not change its character or construction or show that he voluntarily resigned, nor can such a letter be construed as an acquiescence in his dismissal.¹ The dismissal or discharge must be in such terms that there is no doubt in the mind of the employee as to the intention of the employer to terminate the service. When a letter asking an employee "to turn over his desk and papers to another employee," and information next day, when he offered to go to work, that there was nothing for him to do; and a subsequent offer of other and different work than was originally agreed upon; it was held a question for the jury to decide whether the employee had been discharged.²

An employee, in answer to a letter of his employer discharging him, first wrote that he accepted "your ultimatum," and subsequently wrote that he did not thereby mean to release his employer from liability for salary due for the unexpired term of his employment, but to merely concede the right of his employer to discharge him; it was held that the letters were insufficient to release the employer from an existing entire contract of employment.³

It seems that an editor performing such services as his employer directs cannot complain because a part of the paper is taken from his control;⁴ and that a discharged employee who is idle may be recalled to do work which he undertook under his contract of service, and without restoring him to his former office or position.⁵ He need not return at reduced wages, and his refusal to accept less pay than that agreed upon in the contract will not prejudice his right to recover, nor reduce the amount of his recovery.⁶

209. Duty of Discharged Employee to Seek Other Employment.—When an employee has been discharged the law imposes upon him the duty of making reasonable efforts to secure other employment; but extraordinary diligence is not required.⁷ It is incumbent upon the employer to show that the employee could have obtained other employment or that it was offered to him; and then it is necessary for the employee to excuse himself for not accepting, by some just and proper reason for refusing the offer. If he does not, then the amount that he did earn or might have earned between his discharge and the commencement of his suit will be deducted from the wages or damages recovered.⁸

¹ *The Cumberland & Pa. R. R. Co. v. Slack*, 45 Md. 161 [1876]; and see *Pinet v. Montague* (Mich.), 61 N. W. Rep. 876.

² *Klaw v. Ehrich*, 31 N. Y. Supp. 773.

³ *Martin v. New York Life Ins. Co.* (N. Y. App.), 42 N. E. Rep. 416.

⁴ *Lathrop v. Visitor Ptg. Co.* (R. I.), 30 Atl. Rep. 964.

⁵ 14 Amer. & Eng. Ency. Law 795-7.

⁶ *Rosenberger v. Pacific Coast Ry. Co.* (Cal.), 43 Pac. Rep. 963; 14 Amer. & Eng. Ency. Law 795-7.

A person who has been wrongfully discharged is bound only to seek like employment to prevent damages being reduced by his remaining idle.¹ The service offered must be of equal grade, and the fact that the pay is greater in the service that offers itself makes no difference.² He need not visit other communities in quest for work,³ and if he does, it seems he is not entitled to recover his expenses in seeking other employment, though his earnings in such other employment are charged in reduction of his damage.⁴ If he has failed to secure work and devotes himself in the meantime to work of his own, its value cannot be deducted from what is due him under his claim.⁵ In an action for damages for wrongful discharge, the employee need show only readiness and willingness to render the services, and an honest effort to obtain other employment, an actual offer to perform being unnecessary;⁶ he need not allege inability to earn anything during such time as he was idle.⁷

A servant wrongfully discharged has his option to sue at once for his damages, or to wait till the expiration of his term of employment; and the damages recoverable are the amount of his wages, at the contract price, to the date of the trial, where that takes place before the expiration of the term, less whatever sum it is shown that he has earned, or might reasonably have earned, since his discharge.⁸ He is entitled to recover wages up to the time of the trial of the action only, and not to the time the contract of employment would have expired,⁹ because the amount of wages agreed to be paid for the unexpired term is *prima facie* the measure of damages.¹⁰ When a person who had contracted to do certain work for \$1500 was discharged before he had completed the work, and after he had been paid \$500, a verdict for \$2250, in an action by him for breach of contract, is excessive.¹¹

If the compensation of the employee was not agreed upon, he will be entitled to a reasonable sum for the services performed.¹² If the employment be at a stated price for a longer term than is allowed by the statute of frauds, and the employee is discharged without cause before the expiration of the period of employment, he is not limited in his recovery to the price fixed by the contract, but may recover what his services are really worth.¹³*

¹ Fuchs v. Koerner (N. Y.), The Repr. Feb. 1 [1888]; Amer. & Eng. Ency. Law Vol. 5, p. 35, and Vol. 14, pp. 795-7.

² 14 Amer. & Eng. Ency. Law 796; Briscoe v. Litt (Sup.), 42 N. Y. Supp. 908; Chisholm v. Bankers Life Assur. Co. (Mich.), 70 N. W. Rep. 415 [1897].

³ Tickler v. Andrae Mfg. Co. (Wis.), 70 N. W. Rep. 292; 14 Amer. & Eng. Ency. Law 795.

⁴ Stone v. Vimont, 7 Mo. App. 277; Harrington v. Gies, 45 Mich. 374; 14 Amer. & Eng. Ency. Law 796.

⁵ McMullan v. Dickinson Co. (Minn.), 65 N. W. Rep. 661.

⁶ Hamilton v. Love (Ind. Sup.), 43 N. E. Rep. 873; and see Pope v. Lathrop (Ind.

App.), 46 N. E. Rep. 154.

⁷ Hamilton v. Love (Ind. Sup.), 43 N. E. Rep. 873; Efron v. Clayton (Tex.), 35 S. W. Rep. 424.

⁸ Zender v. Seliger-Toothill Co. (Sup.), 39 N. Y. Supp. 346.

⁹ Hamilton v. Love (Ind. Sup.), 43 N. E. Rep. 873; Babcock v. Appleton Mfg. Co. (Wis.), 67 N. W. Rep. 33; Worthington v. Oak & H. P. Imp. Co. (Iowa), 69 N. W. Rep. 258.

¹⁰ Missouri Iron Wks. v. Rivers Arch. Co., 59 Ill. App. 545.

¹¹ Howard v. Gobel, 62 Ill. App. 497.

¹² Schanzenbach v. Brough, 58 Ill. App. 526.

* See Sec. 90, *supra*.

If the employee sue for damages he can recover only such damages as he has actually sustained by the discharge, and not the agreed price for full performance.¹ One properly sues on his contract of employment for his salary, rather than for damages for breach thereof, where he has not been discharged, and has held himself in readiness, though he has rendered no services, because no work has been offered him.²

210. No Recovery for Extra Work, Unless so Agreed.—When a person is employed as an agent at a fixed rate and additional duties are imposed and his powers enlarged without any stipulation that he is to receive additional compensation, the agent or employee cannot recover extra wages for his additional services.³ It is a general rule that voluntary performance of extra work by a servant does not entitle him to extra pay. If he gets extra pay for his extra work it must be under an express agreement to that effect.⁴

It has been so held when the statute law makes eight hours a day's work. The fact that an employee works ten or twelve hours a day when hired by the day does not entitle him to recover for the two hours extra time each day, unless it was expressly so agreed in the contract of employment.⁵ A contractor who is to complete a building according to certain specifications and a plan annexed, as explanatory thereof for a fixed amount, cannot, in the absence of an express agreement, recover for extra services in preparing the plan.⁶

211. Employment of Engineer or Architect in a Professional Capacity.⁷—A contract of employment of an engineer or architect or a so-called engagement of his services does not differ from any other contract of employment if the contract is expressed and its terms fully understood, but this is not often the case. The whole transaction between the engineer or architect and his employer frequently is embodied in a few words, or a mere verbal instruction to "make some sketches," or "I should like to see your suggestions on paper," followed by similar directions to "go ahead" with the plans or even with the building.⁸ Such contracts for services are not unlike the engagement of a physician or an attorney, with which all are familiar, and the duties that may be required under such an employment must depend largely upon the established and universal custom

¹ William Farr Co. v. Kimebrough (Ky.), 34 S. W. Rep. 528.

² Stone v. Bancroft (Cal.), 44 Pac. Rep. 1069.

As to Recovery for Services when term of service has not been completed, Remedies of Servants, and Breach or Abandonment by Servant, see 14 Amer. & Eng. Ency. Law 775, 779.

³ Morean v. Dumagene, 20 La. Ann. 230 [1868]; Carrere v. Dun, 18 Misc. Rep. 18 [1896]; Chamberlain v. Kansas City (Mo.),

28 S. W. Rep. 745, *Superintendent of Buildings*.

⁴ 14 Amer. & Eng. Ency. Law 772; and see Forster v. Green (Mich.), 69 N. W. Rep. 647; Voorhees v. Combs (N. J.), 4 Vr. 494.

⁵ Averill v. United States, 14 Ct. of Cl. 200; and see People v. Beck (N. Y. App.), 39 N. E. Rep. 80.

⁶ Maas v. Hernandez (La.), 19 So. Rep. 269; but see Dull v. Bramhall, 43 Ill. 364.

⁷ See Emden's Law of Building, chap.

* See Sec. 225, *infra*.

and usage. Physicians are called upon or called in to advise in reference to a patient's treatment, or an attorney with respect to a point of law, and the law implies a contract on the part of the patient or client to pay what the services are reasonably worth,¹ and a contract on the part of the physician or lawyer to furnish a reasonable degree of skill and care in the administration of his duties and functions, such as is ordinarily possessed by members of his profession;² and to furnish the attendance and services usual in the practice of his profession.

The engagement of an engineer or architect would come under the same rule or principle if his duties were undefined. They would depend upon the practice of the profession as established by custom and good usage. The duties of an engineer or architect are largely determined by the terms of the contract for the erection of the structure and works, as well as by the contract of employment. It is there that they are set out and defined with great particularity, and when they have been so described either in the contract of employment or in the contract for the work, it is not a question of what proper skill and care he should exercise, but what amount of care and skill he has bound himself thereby to bestow upon the works.³ The duties required are to be determined from the contract of employment and what is required by the construction contract, and if these fail to define them, by evidence of the general usage of engineer and architects. The intention of the parties as evidenced by all these will control.⁴

212. What Constitutes an Employment of an Engineer or Architect?—This is Often a Difficult Question.⁵—When they are invited to submit plans in competition with others for approval and adoption, or to contend for prizes offered for the best plans to be determined by judges, or to make bids according to plans furnished, subject to acceptance by a board or committee of public works, and plans have been accepted provisionally or in part, or special ingenious features been copied or pirated while under examination for comparison, or by permission of the examiners or board of control, then the questions of employment and remuneration arise.

When an architect prepares plans upon the terms that he shall be employed to carry them out if approved, it seems he has no claims for his services if they are disapproved.⁶ When an architect prepared plans for a jail building, which plans were accepted conditionally, provided that a bid should be received from some reliable party for the building of the jail, and

viii; *English*; Roscoe's Digest of Building Cases (2d ed.) 1-10, *English*; Lloyd's Law of Building, chap. ii; Clark's Architect, etc., Before the Law, chaps. i and ii; 29 Amer. & Eng. Ency. Law 875-890. See *Kutts v. Pelby*, 20 Pick. (Mass.) 65; and *Driscoll v. School Dist.*, 61 Iowa 426.

¹ *Nourry v. Lord*, 3 N. Y. App. 392.

² *Utey v. Burns*, 70 Ill. 162 [1873]; and see *Marcotte v. Beaupre*, 15 Minn. 153.

³ *Vigeant v. Scully*, 20 Brad. 437 [1886].

⁴ *Vigeant v. Scully*, 20 Brad. 437; see *Gilman v. Stevens*, 54 How. Pr. (N. Y.) 197.

⁵ *Kutts v. Pelby*, 20 Pick. 65 [1838].

⁶ *Moffat v. Dickson*, 13 C. B. 534 [1853]; *Moffat v. Laurie*, 15 C. B. 583; *Leake's Digest of Contracts* 640-641; *Ada St. M. E. Ch. v. Garnsey*, 66 Ill. 132; *Addison on Contracts* 678; but see *Walsh v. St. Louis Exposition*, 90 Mo. 459, 16 Mo. App. 503, *affirmed*.

the board of supervisors refused to open any of the bids received, and rejected plaintiff's plans on the ground that he had been guilty of improper acts in getting his plans provisionally accepted, it was held that it was within the discretion of the board to refuse to open or accept any of the bids based upon plaintiff's plans and that, the condition upon which plaintiff was entitled to compensation never having happened, he could not recover;¹ but upon appeal it was held that the plans had been adopted within the meaning of the act, and that the plaintiff could recover.² The word "received" as used was held not to include the acceptance of a bid.³ An invitation to architects to submit competitive designs of a building, giving the location of the site and a general description of the building which it proposes to erect, the designs to be passed upon by a board of expert examiners, the author of the design accepted to be employed to complete a full set of plans, gives no claim for services unless the plans are accepted;⁴ and when it was further stipulated that no award need be made by the examining board if they should deem none of the designs worthy, it was held that it was in the discretion of the society whether the examiners should examine the designs each separately for himself or together as a board; and, further, that the society might, after taking the opinions of the examiners, ignore their action and erect such a building as it chose.⁵

For plans and specifications submitted with their bids for work, the engineers or architects get nothing for their plans and trouble if their bids are not accepted;⁶ and the same is true if his pay depends upon the happening of an event that never comes to pass, such as "the forming of a club," or that the "plans are adopted," or that "we decide to build,"⁷ or "the sale of land for building purposes," notwithstanding the contract contains a provision that "in the event of the architect's services being dispensed with at any time, he should be remunerated for the time, trouble, and expense he had been put to in making the said preparations," he not having offered to prove that his services had been dispensed with.⁸ If an architect voluntarily draws plans with the hope or expectation of being employed as architect and superintendent, he cannot recover if not employed. There must be a contract of employment either expressed or implied.⁹

When a committee had been authorized by a resolution of a board of

¹ Hall v. County of Los Angeles (Cal.), 13 Pac. Rep. 854.

² Hall v. Los Angeles, 74 Cal. 502 [1888].

³ Hall v. Los Angeles, *supra*.

⁴ Moffat v. Dickson, 22 L. J. C. P. 265 [1853].

⁵ Donaldson v. Detroit Museum of Art (Mich.) 40 N. W. Rep. 33 [1888]. A just rule, perhaps, in law, but it affords no protection to the architectural profession, from whom a society could secure many designs and practical hints and beautiful features for a structure for the mere nom-

inal cost of advertising.

⁶ Woods' Master and Servant (2d ed.) 103.

⁷ Romeyn v. Sickles, 108 N. Y. 650 [1888].

⁸ Moffat v. Laurie, 15 C. B. 582 [1855].

⁹ Allen v. Bowman, 7 Mo. App. 29; Nelson v. Spooner, 2 F. & F. 613; Moffat v. Dickson, 13 C. B. 543; Smithmeyer v. United States, 147 U. S. 342; Tilley v. Cook Co., 103 U. S. 155; and see Chicago v. Tilley, 103 U. S. 146; Dunton v. Chamberlain, 1 Bradw. 361.

✓ directors of a school district to procure plans for a school-house and present the same at the next regular meeting, and the committee called on an architect and said, "We have come to select plans for a school-house," and they selected one and gave directions to make some changes, asked the architect to meet the board, and expressed themselves suited, and that they did not care to look further; it was decided that clearly the architect was employed to prepare plans, and that his amount of recovery should be determined by the jury, that the fact that the plans were returned to the architect and not used did not alter the case; and that though it was further claimed that there existed a universal custom among architects to prepare and furnish plans for buildings and take their chances of the same being approved or adopted before they were entitled to compensation, yet the custom not being proved, the architect was allowed to recover.¹ Where plans have been submitted, by direction of a landowner, by an architect, who afterwards took them away, the taking of the plans was held not to be of itself an admission that the services were wholly voluntary and without any idea of compensation.² When an architect at the request of a proprietor prepared plans for a theater, drew a sketch of a front which was presented to and kept by the proprietor for a week, who, being pleased with it, directed the architect to make the plans, and the proprietor directs his master-builder to call on the architect and make an estimate of its cost, which he did, keeping the plans for a week, and afterwards the proprietor having decided not to build refused to pay for the plans, it was held that there had been a proper delivery of the plans and that the architect was entitled to compensation for his services.³

If one of the several plans drawn for a church building be accepted on condition that the building could be built for a certain sum, and it is ascertained that it cannot be built for such sum and the plans are rejected, there is a failure to show any promise to pay for the plans, and the architect is not entitled to recover for making the plans.⁴ A proposition to certain architects which has been made for plans and specifications of a certain proposed building under the terms of which each architect shall receive a definite sum, irrespective of merit, and this further clause, "That the architect who is successful shall not receive the compensation named, but he shall be engaged as architect and superintendent and shall be paid, etc.;" the architect whose plans were accepted as the most meritorious of all has a right of action for refusal to employ him as architect and superintendent.⁵

If one proposes to erect a building and employes an architect by contract in writing to draw up plans and specifications, superintend the work

¹ *Driscoll v. The Ind. School Dist.*, 64 Iowa 426 [1883].

² *Nourry v. Lord*, 2 Keyes 617 [1866].

³ *Kutts v. Pelby*, 20 Pick. 65 [1838]; and see *Shipman v. State*, 42 Wis. 377; *Marcotte v. Beaupre*, 15 Minn. 152; *Nelson v.*

Spooner, 2 F. & F. 613.

⁴ *Ada St. M. E. Ch. v. Garnsey*, 66 Ill. 132 [1872]; *Marsh v. Astoria, etc.*, 27 Ills. 421.

⁵ *Walsh v. St. Louis Ex. & Mus. Hall Assn.*, 90 Mo. 459 [1886].

and audit claims, he cannot show by parol evidence that the building was not to be erected, and the architect not to be paid unless a loan could be procured for that purpose. The fact that he was to be paid in installments, one when the drawings were made and the balance at specified stages of the work, it not appearing that the first payment was intended as the price of the drawings did not make the contract divisible, and though the employer failed to build, the contract price was held to be entire, and the value of the architect's services constituted the measure of damages.¹ When, however, the contract was to pay two and one-half per cent. of the estimated cost for the preparation of the plans, and the payment of three per cent. and five per cent. were contingent engagements to be performed after the plans were prepared, the contract was held divisible, and the architect having been discharged after the preparation of the plans, he was allowed to recover the two and one-half per cent. only.²

Under a contract to furnish the necessary drawings, specifications, and details for a certain percentage on the total cost of the structure, the architect, after furnishing the drawings, etc., is not limited, in case his employment is terminated before the building is completed, to a recovery of the percentage on the cost of the building in so far as it was at the time completed.³

213. What Is a Performance of a Contract of Service?—An architect was held to have complied with his contract to furnish plans and specifications for a building to cost \$10,000 when he had furnished plans, etc., for a building that would cost \$16,000, at the same time making proposals to reduce the cost in certain respects, making the plans to apply to a building that would not cost more than \$10,000.¹ Plans and estimates of a building to cost \$102,000, exclusive of architect's and superintendent's fees, the latter of which would have been five per cent. if the architect had the superintendence, was held to be a sufficient compliance with a contract to prepare plans and estimates of a building to cost about \$100,000, and the opinion was further expressed that plans for a building to cost \$100,000, would not satisfy a contract for a building to cost not more than \$75,000, nor does it necessarily follow that it would be satisfied by plans for a building to cost any sum between \$75,000 and \$100,000.⁴

When a contract for the preparation of plans and specifications stipulated that the architect should have said plans and specifications drawn in a good and sufficient manner, to be altered and changed in such manner as the board of commissioners might, at any time, deem proper and best, and that the said architect should make, alter, and change the same plans until

¹ *Marquis v. Lauretson* (Ia.), 40 N. W. Rep. 73 [1888].

² *Ebby v. McGowan*, Roscoe's Digest Bldg. Cases 134; and see *Clark's Architect*, etc., before the Law, chap. viii.

³ *Havens v. Donahue* (Cal.), 43 Pac. Rep.

962; and see *Scott v. Maier*, 56 Mich. 514; *Chicago v. Tilley*, 13 Otto 146; *Lambert v. Sanford*, 55 Conn. 437.

⁴ *Smith v. Dickey*, 74 Tex. 61 [1889], see *Nelson v. Spooner*, 2 F. & F. 613.

the said board of commissioners should be satisfied, it was held the request to make changes should come from the board acting officially and not from individual members acting in their private capacity.¹*

When a premium has been offered for plans, which have been adopted and the promised compensation been paid to the architect, it was held he could collect no more, notwithstanding a usage among architects to superintend the building of their designs at five per cent.; that when there is no contract expressed or implied, usage or custom cannot make one.² A resolution passed by a board of public works, which has supervision of the superintendent of buildings, to the effect that C, superintendent of buildings, shall be architect of the City Hall, and shall have supervision of the construction thereof, was held not to constitute a contract of employment of C, as supervising architect, authorizing a recovery by him for his services as such in addition to his salary.³ In a case where an architect had been regularly employed to make plans and designs for a building, evidence was received to prove a custom that the employment carried with it an engagement to superintend its construction.⁴

214. Recovery for Services Rendered.—The obligation of paying for the drawings of an architect usually rests upon the employer, and not upon the mechanic who executes the work. If an owner has requested an architect to furnish a design, and paid him for it, but did not employ him to prepare drawings and would not pay him for them, it was held that the fact that the owner was not liable was not sufficient to charge the builder. The builder not having made any prior request for plans, nor any subsequent promise to pay for them, could not be charged with the obligation of paying for them.⁵ The same question of responsibility arises in the employment of engineers when called upon to stake out work. In engineering work, generally, the obligation to pay rests upon the person who requested the work to be done,⁶ unless it is work that properly belongs to the engineer by his contract with company or by the contract between his company and the contractor.

Where an architect performs work and labor upon a building on the joint employment of two persons, an action will be against them jointly, although no partnership exists between them in either the land or building. Such joint employment may be inferred from circumstances, as when both the defendants have given directions as to the work, its character, and mode of execution; and when one denies his liability, his promises to pay certain bills relating to the construction of the building, the indorsements by him of notes therefor, his ownership of the land and ultimately of the building, and

¹ Board of Com'rs. v. Bunting (Ind.), 12 N. E. Rep. 151 [1887].

² Tilley v. Co. of Cook, 103 U. S. 955 [1880]. Compare First Unit. Soc. v. Faulkner, 91 U. S. 415.

³ Chamberlain v. Kansas City (Mo.), 28

S. W. 745; and see Walsh v. St. Louis Exposition, 101 Mo. 534.

⁴ Wilson v. Bauman, 80 Ill. 493 [1875].

⁵ Webb v. School, 3 Phila. (Pa.) 125 [1858].

* See Sec. 39.

his uniting in the examination of accounts of the architects and in settling the balance due, are sufficient evidence to support the judgment.¹

A custom to charge a percentage of the architect's own estimate of the cost, it seems, cannot be resorted to to determine an architect's compensation for preparing preliminary sketches not accepted. Such a custom was held unreasonable and preposterous.² Such services, unless volunteered, should be paid for, if at all, according to the time spent upon them, or according to such understanding as could be fairly implied from circumstances,³ and not according to the schedule of charges of the American Institute of Architects, especially when the architect has accepted a salary.⁴

If the compensation is agreed upon as a percentage of the estimated cost of the buildings, the architect may recover on the reasonable cost, according to his plans and specifications, and bids made by third persons may be used to show what is a reasonable cost.⁵ The architect is a competent witness in his own behalf upon the question of the value of his labor in drawing plans,⁶ as are other architects.*

The employment of engineers is often equally perplexing. Frequently they are called upon to render advice or services by officers of corporation, whose authority is questionable, and if the advice or services turns out to be unnecessary, unprofitable, or expensive, the company sometimes seek to avoid paying for it. A letter from a secretary of a provisional committee organized for the purpose of projecting a railway and signed by him, to an engineer conveying a record of minutes of a meeting of the committee, that it was resolved that R. (the engineer) be requested to accept the office of "joint engineer to the line," was held to be inadmissible as evidence of the engineer's employment, as were the minutes themselves, not being signed by the chairman, and no proof being offered that there was a meeting on that day, or who was present.⁷

If an engineer is called and consulted with regard to works, and his plans and estimates have been adopted by the board of directors of a company, his employment may be said to have been proved, without any formal contract. The fact that he was recommended to the company, and its officers set him

¹ *Beach v. Raymond*, 2 E. D. S. (N. Y.) 496 [1854].

² *Tilly v. Cook*, 13 Otto 155; *Lloyd's Law of Building*, etc., 11, citing *Eddy v. McGowan*, not reported; but see *Knight v. Norris*, 13 Minn. 473; *Irving v. Morrison*, 37 C. P. (Upper Canada) 242; and *Mulligan v. Mulligan*, 18 La. Ann. 20, *contra*.

³ *Scott v. M'ier*, 56 Mich. 554 [1885]; *semble*, *Marcotte v. Beaupre*, 15 Minn. 152; *Dull v. Bramhall*, 49 Ill. 364, *what is reasonable*; *Lloyd's Law of Building* (2d ed.), § 8.

⁴ *Smithmeyer v. United States*, 147 U. S.

342; but see *Gilman v. Stevens*, 54 How. Pr. (N. Y.) 197.

⁵ *Lambert v. Sanford*, 55 Conn. 437 [1887]; and see *Roeder v. Bensberg*, 6 Mo. App. 445; *Shipman v. State*, 43 Wis. 381; *Irving v. Morrison*, 27 U. C. C. P. 242; *Maack v. Schneider*, 51 Mo. App. 92. Agreements are sometimes made forbidding or preventing any extra charges. *Baltimore Cem. Co. v. Coburn*, 7 Md. 202; *Abbott v. Gatch*, 13 Md. 314.

⁶ *Nourry v. Lord*, 2 Keyes R. 617 [1866].

⁷ *Rennie v. Wynn*, 4 Exch. 691 [1849].

* See Sec. 291. *infra*.

at work, if the company had the benefit of his services knowingly, they are liable to him for their value.¹

So it has been held that an engineer is entitled to recover for services and advances rendered, with the knowledge and consent of the company's engineer and attorney, and which were essential in preparing to construct a railroad, and for drawings procured and paid for by him, and approved by the company's president.²

When an engineer was assured by a company's engineer that he would be made a subcontractor and subrogated to the rights of the contractor, and he received a notice of the approval of this arrangement by the board of directors, through the attorney of the company, it was held he was entitled to recover for his services and expenditures on the company's refusal to award him the contract. The fact that the engineer and attorney were not duly appointed by the company, until the meeting when the directors approved of the arrangement of subrogation, did not alter the case, for the engineer and attorney represented and acted with the authority of the company.³

Under a charge for services, an engineer may prove and recover for services whether performed by himself or an assistant, or by both, unless it appears by the nature of the terms of the employment that the personal services of that particular engineer were contracted for and no other person could under the agreement fill his place; he may under an allegation of services performed by him prove that they were performed by another person under him.⁴

The employment of an engineer to survey and establish a railroad line clothes him with authority to employ subordinates and assistants for the purpose on behalf of the railroad company, and such assistants are the servants of the company.⁴

¹ *Moline W. P. & Mfg. Co. v. Nichols*, 26 Ill. 90 [1861].

² *Wilson v. Kings Co. El. R. Co.*, 21 N. E. Rep. 1015 [1889].

³ *Leet v. Wilson*, 24 Cal. 398 [1864].

⁴ *Gillis v. Duluth, etc., R. Co. (Minn.)*, 25 N. W. Rep. 603; *New Orleans, etc., R. Co. v. Reese*, 61 Miss. 581.

CHAPTER IX.

PROPERTY OF ENGINEERS OR ARCHITECTS IN DESIGNS AND INVENTIONS.

OWNERSHIP OF PLANS, SPECIFICATIONS, AND DRAWINGS. CORPOREAL AND INCORPOREAL PROPERTY RIGHTS.

215. Ownership of Plans, Drawings, and Designs.—It is customary for engineers and architects to retain the ownership of their plans by a special agreement with their employers to that effect. In the absence of such an agreement or understanding, it has been held that the employer is entitled to keep them when he has paid the architect a reasonable remuneration for his services. A custom to the contrary was adjudged “unreasonable, impossible, and suicidal.” In this case the architect’s services had been dispensed with before the building was completed, and the judge compared it to an attorney refusing to deliver up the papers of his case to his client because his employment was determined.¹ The French courts have also given the owner the right to the plans when he had paid for them, or had recompensed the architect or engineer.²

Whether the same rule would be held as to the ownership of plans after the building was completed is doubtful; and it is equally dubious that a client can demand the papers and documents prepared by an attorney in conducting his case after the trial is concluded. It is certain that it is the universal practice of architects to take or retain their plans, both in England and the United States, when the structure has been completed.

Alabama affords a case where an architect who took the plans and specifications away from an unfinished building was prosecuted by the builder for larceny [stealing]. It was held by the Supreme Court that the builder was entitled to the use and possession of the plans during the construction of the building and that he might have a special property in them, the invasion of which would be a trespass, even though under the contract the ownership of the plans was in the architect. To constitute larceny the wrongful taking must have been secret or fraudulent, and done with felonious intent to convert the property to the taker’s own use and to deprive the

¹ *Ebdy v. McGowan*, Ct. of Exch., Nov. 17, 1870, *The Times*; s. c., Roscoe’s Digest of Building Cases 134; and see Clark’s

Architect, etc., Before the Law 129.

² Dalloz 1871, 2, 83; 1849, 2, 171.

owner of his property. If taken openly in the presence of the owner, or in the presence of other persons known to him, the taking and carrying away would be a mere civil tort. Here the architect committed a trespass when he took the plans away from the builder without his consent, after an unconditional delivery of them to him.¹

This case further held that the architect might show the existence of a universal custom among architects and builders to the effect that the plans and specifications belonged to the architect by whom they were made.² When plans are submitted in competition for a cash prize, it has been held that those plans which were awarded the prize became the property of the party inviting the competition upon tendering the amount of the prize offered.³ When competitive plans are sent by a common carrier to the parties inviting competition and their delivery is delayed until after the time specified, owing to the negligence of the carrier's employees, the damages to be assessed is the value of the architect's chances in getting the prizes, and not the value of the time and labor expended in making said plans and specifications. To recover anything more than nominal damages the architect should show that there was some probability of his plans being adopted.⁴ A later Massachusetts case held that when plans, delivered to an express company, had been lost in transit, the damages were the value of the plans to the person to whom they were sent, not their immediate value, as that would include damages for the delay in building the structure, which could not be given. The fact that the plans had a special value to the architect which could not be purchased, and that he had other contracts and had undertaken other work in expectation of having these plans for immediate use, cannot be considered. The measure of damages was held to be the reasonable cost of new plans and any other expenses reasonably incurred in procuring new ones.⁵

216. Incorporeal Property in Architectural and Engineering Designs.—Copyright and Patent-right.—However doubtful the ownership of the plans themselves may be—*i. e.*, the corporeal embodiment of the design, or the paper or cloth which bears or conveys the conceptive ideas and designs of the engineer or architect—it cannot be doubted that any use of his plans without his permission, such as copying them or reproducing them, or even building from them, would be a tort to the architect's natural property in his own creations, as much as the copying of an artist's painting or the modeling of a sculptor's work of art. The one is the creation of an

¹ *Lumsford v. Dietrich*, 86 Ala. 250 [1888]; *see also Marcotte v. Beaupre*, 15 Minn. 152.

² *Lumsford v. Dietrich*, 86 Ala. 250 [1888]; *but see Tilley v. Cook Co.*, 103 U. S. 162.

³ *Walsh v. St. Louis Exp'n*, 101 Mo. 534.

⁴ *Adams Exp. Co. v. Egbert*, 36 Pa. St.

360; *but see Watson v. Ambergate*, 15 Jur. 448.

⁵ *Mather v. American Exp. Co.*, 138 Mass. 55 [1884], *citing Hadley v. Baxendale*, 9 Ex. 341; *Green v. Boston & L. R. Co.*, 128 Mass. 221; *and see Clark's Architect, etc., Before the Law*, 26.

engineer's or architect's cultivated taste and training, the other perhaps of an artist's perception, taste, and genius.¹

Both are works of art, and one should be protected as much as the other. Surely not because the one is the more vulgar, for the law protects from publication or reproduction the most insignificant sketch, picture-card, and every manuscript book or personal letter written. An architect's plans are his own creation, and one can have no better rights or claims to a property in a thing than that which owes its existence to his own creative genius.

This property, however, is vested by law in him only so long as he retains possession and control over his incorporeal creation. If the artist sell his picture or the author his book, or either makes a profitable use of it, such a use as it was designed for or intended, he may lose that inherent and exclusive right to his own creation, and it becomes the common property of a jealous and selfish public.² An author may give away a copy of his manuscript,³ he may send it as a communication to another, as in the case of a letter to a friend,⁴ he may permit a copy to be made,⁵ he may lecture from it in public or in the class-room,⁶ he may have it printed and distribute copies among his friends or an association, if it be expressly understood and agreed that their use shall be restricted and that they are not to be sold, and that the act of distribution is not a publication.⁷ A consignment of a lot of books to a bookseller, with orders not to sell until a certain date, is not a publication until sold, after that date.⁸ Nor is the delivery of copies of a report to the state, without any distribution thereof, a publication.⁹ The sale of a book is *prima facie* a publication.¹⁰

The artist may exhibit his picture in a public salon¹¹ without losing his exclusive right to multiply copies, publish it, or his exclusive right to a copyright. If he publishes work or sells copies of it without first securing a copyright from the government, his sole right to an exclusive enjoyment of the fruits of his labors is gone. He should first secure the protection of the government in whose territory he expects to sell it.¹²

The same holds with regard to all intellectual productions which have

¹ *N. E. Monumental Co. v. Johnson* (Pa.), 22 Atl. Rep. 974.

² *Accord*, *Holmes v. Donohue* (C. C.), 77 Fed. Rep. 179.

³ *Queensbury v. Shebbare*, 2 Eden 329; *Blunt v. Patten*, 2 Paine (U. S.) 393, a map.

⁴ *Pope v. Curle*, 2 Atk. 342; *Thompson v. Stanhope*, Ambler 737; *American cases cited*, 4 Amer. & Eng. Ency. Law 151, note.

⁵ *Forrester v. Waller*, 2 Eden 328; *Bartlett v. Crittenden*, 5 McLean (U. S.) 32.

⁶ *Caird v. Sime* (Eng.), 12 App. Cas. 326, 3 Ry. & Corp. L. J. 343 [1887]; *Miller Ap-*

peal, 107 Pa. St. 221 [1884]; *Abernethy v. Hutchinson*, 1 H. & T. 28; *Nichols v. Pitman*, L. R. 26 Ch. D. 374.

⁷ *Jewelers' Merc. Agcy. v. Jewelers' Wkly. Pub. Co.*, 32 N. Y. Supp. 41; *but see Rigney v. Dutton* (C. C.), 77 Fed. Rep. 176.

⁸ *Wall v. Gordon*, 12 Abb. Pr. N. S. (N. Y.) 349.

⁹ *Myers v. Callahan*, 5 Fed. Rep. 726.

¹⁰ *Baker v. Taylor*, 2 Blatchf. (U. S.) 82; *Rigney v. Dutton*, *supra*.

¹¹ *Werckmeister v. Springer L. Co.* (C. C.), 63 Fed. Rep. 808.

¹² *Rigney v. Dutton*, *supra*.

been made the subject of statutory copyrights, including maps, charts,¹ musical compositions, engravings, photographs,² paintings, works of sculpture, etc.; in short, all productions of literature, the drama,³ music, and art, and even the letters a man has written, are within the protection of the law, whether of literature, art, or science, if such work is unpublished, and kept for his private use or pleasure. That his rights are absolute cannot be disputed.⁴ Nobody has a right to publish them, to multiply copies of them, without permission of the author or artist who first wrote, painted, draughted, modeled, or made them; in short, created them.⁵ The passage by Congress of the copyright statutes has not abrogated the common-law right of an author to his unpublished manuscript.⁶

What will constitute a publication of a piece of statuary, a monumental design, a triumphal arch, or an artistic structure, as an art building, or even an apartment house, has not been decided. It has been said that any profitable use for which the work was intended would amount to a publication, and the opinion has been judicially expressed that pieces of statuary which decorated public squares and other like places are published by being so publicly exhibited.⁷ A gateway, a monument, or an architectural edifice would be subject to the same line of reasoning.

It had also been intimated that the public exhibition of a picture would be a publication, but a recent case has decided that the exhibition of a painting in a public salon, or the printing in the salon catalogue of a crayon sketch of the same painting, did not amount to such a publication of it as to work a forfeiture of the right to a copyright, unless the general public was permitted to take copies of it.⁸ In any case, it is a question of intention of the author whether or not he has parted with his original rights in the creation.⁹

Whether a copyright would be granted upon an architectural or engineering structure as a work of art has never, it is believed, been decided; but so far as principle is concerned, it is difficult to understand why it should not be given protection as well as a painting or a piece of statuary. Indeed, in some cases it would be difficult to draw the line between the subject of art entitled to protection and the edifice which would not be protected. That section of the English copyright act which gives protection to statuary mentions only the human body and its parts and dress, and the figures of animals, which would not include ordinary decorations of wood and stone as applied to architectural structures.

¹ Rees v. Pettizer, 75 Ill. 475.

² Falk v. Donaldson (C. C.), 57 Fed. Rep.

33.

³ Aronson v. Baker (N. J.), 12 Atl. Rep. 177 [1888].

⁴ Drone's Law of Copyright 174; Press Pub. Co. v. Monroe (C. C. A.), 73 Fed. Rep. 196.

⁵ Amer. & Eng. Ency. Law 148-150.

⁶ Press Pub. Co. v. Monroe (C. C. A.), 73

Fed. Rep. 196.

⁷ Turner v. Robinson, 10 Irish Ch. 516 [1860]; Copinger's Law of Copyright 382, 383.

⁸ Werckmeister v. Springer Lithograph Co. (C. C.), 63 Fed. Rep. 808; but see *contra*, Pierce & B. Mfg. Co. v. Werckmeister (C. C. A.), 73 Fed. Rep. 54.

⁹ Prof. Langdell in his lectures at Harvard; *semble*, Pope v. Curle, 2 Atk. 340.

217. Rights of a Purchaser to Incorporeal Creations.—If one purchases the copyright of a picture with the picture, he holds the picture free from any interference, and with the perfect right to deal with it as he pleases. If, however, he buys the picture simply as a picture, or the author or artist has reserved the right of reproduction, the purchaser will then have the gratification and delight derived from its contemplation, but he cannot make copies or engravings from it, or use it for a different purpose from that for which the artist sold it;¹ the purchaser, in such a case, is not a proprietor within the meaning of the copyright law. The author or artist retains his right to a copyright.

An architect or engineer should have the same property in his own creations, whether they be the drawings themselves, an artistic design of a column, or a structure such as a building, an arch, or even a bridge. In America it has been held that a draughtsman or designer has such property in a model or plan of his own composition as to be entitled to maintain an action for the unauthorized use of such, although no letters patent or copyright had been secured.²

218. Copyright of Plans and Drawings.—Whether the plans or drawings of a building may be copyrighted does not seem to be perfectly well settled. In point of justice and sound public policy, no good reason exists why an architect's plans should not be protected by copyright. Copinger, in his work on Law of Copyright, is authority for the statement that in the English act the word drawing includes architectural design.³ Drone, in his work on Copyright Law, passes the subject by with the simple statement that plans are not mentioned in the American statutes, while maps and charts are included.⁴ The word chart has been held not to include sheets of paper exhibiting tabulated or methodically arranged information. The courts distinguished⁵ between charts that convey information of a literary nature and those that impart knowledge of geography or art. These sheets could doubtless have been copyrighted as a book. A dressmaker's chart, or diagram for cutting ladies' garments, has been held to be a book,⁶ and art designs are a subject of copyright.⁷ The superior likeness of a dressmaker's chart to a book, when compared with a collection of plates or plans of an architectural or engineering structure (suppose them sun-printed, to escape the question of reproducing copies), will not be apparent to most people, and if the former is a subject of copyright as a book, certainly the latter should be equally so. Books of designs, simple reprints of architectural plans, with very little text or explanations accompanying them, have been copyrighted, and are in the possession of almost every architect and engi-

¹ *Werckmeister v. Springer Lithograph Co.*, 63 Fed. Rep. 808; *Copinger's Law of Copyright* 388.

² *N. E. Monument Co. v. Johnson (Pa.)*, 22 Atl. Rep. 974; *semble*, *Blunt v. Pat-ten*, 2 Paines (C. C. Rep.) 397.

³ *Copinger's Law of Copyright* (2d ed.) 389.

⁴ *Drone on Law of Copyright* 174.

⁵ *Taylor v. Gilman*, 24 Fed. Rep. 632.

⁶ *Deury v. Ewing*, 1 Bond (U. S.) 40.

⁷ *Grace v. Newman*, L. R. 19 Eq. 623.

neer. If ordinary plans are refused, where shall the line be drawn? Will the amount of text accompanying the drawing be the test, or the character of the book, or its form, the covers, the title page, or the binding? Will the method of reproduction, whether from a printing-press or a blue-print frame, enter into the case? An unprinted book, which existed only in the manuscript, has been held the subject of copyright.¹ Finally, will it matter if the book consist of one sheet or several? It has been held not, for a book may be on one sheet.²

There is no just reason why an architect or engineer should not be protected by copyright as well as an artist. His property rights are certainly as well defined, and in view of other things copyrighted, it is difficult to see how it could be denied. The selfishness of the public and the fact that the progress and growth of our country may demand that the industrial and practical be not made exclusive, might be a remote reason why it should not be given the same protection; but this argument would apply as well to maps and charts, and to patentable inventions.

Under the United States copyright act of 1831, a photograph was not a subject of copyright,³ but a later statute grants copyright protection to photographs and to the negatives thereof, and such an act has been held not unconstitutional.⁴

A photographer has no right to make copies of a customer's photograph without his permission,⁵ and it may be doubted if he can copyright it. A private individual may enjoin the publication of his portrait when a public character cannot, unless the photograph has been secured by some violation of confidence or breach of agreement. A person who is one of the foremost inventors of his time has been held a public character.⁶ The power of the World's Columbian Exposition to grant an exclusive privilege to make stereopticon views of objects within the exposition, and to sell such views, has been held a matter of grave doubt.⁷

219. Rights of an Author, Inventor, or Designer when in the Employ of Another.—In sympathy with and close connection to this subject of the ownership of designs and artistic features created by an architect or engineer are his rights to plans, improvements, and inventions made by him while an employee. If in his contract of employment it is agreed, or understood or may be reasonably implied, that the production of his every effort, mental as well as physical, should be the property of his employer, that his designs, improvements, and inventions, and all other incorporeal creations should belong to his employer, then there can be no question but that the em-

¹ *Roberts v. Myers*, 23 Law Rep. 396; but see *Jewelers' Merc. Agcy. v. Jewelers' W. Pub. Co.*, 32 N. Y. Supp. 41.

² *Drone on Copyright* 142.

³ *Wood v. Abbott*, 5 Blatchf. (U. S.) 325.

⁴ *Sarony v. Burrow Giles Lith. Co.*, 17 Fed. Rep. 591; *Schreiber v. Thornton*, 17

Fed. Rep. 693; see cases of copyrighted photograph cited in *Springer Lith. Co. v. Falk* (C. C. A.), 59 Fed. Rep. 707.

⁵ *Corliss v. E. W. Walker Co.* (C. C.), 64 Fed. Rep. 280.

⁶ *Kilburn v. Ingersol* (C. C.), 67 Fed. Rep. 46.

ployer could rightfully claim them; but if no such agreement has been made or can be implied, then the employee is entitled to the uses and benefits of his creations.¹ Such an agreement has been held not against public policy.²

Architects are usually employed for their ability to design and create features of utility and decoration, and it is submitted that their contract of employment would generally include the right to the use, at least, of any features of design, decoration, or arrangement that they might create; but it would not include any new method of construction, or a new material, or a new process for the manufacture of it.

It has been held that if a company employ a chemist to work with its materials as a chemical expert, in order to develop new products and processes for its benefit, it acquires no right to the chemist's discoveries made during such employment, but only a license to use them;³ but if an employee invents flavoring compounds with materials supplied by the firm, and it is the intention of all the parties that the processes by which the compounds are prepared shall belong to the firm, and be trade secrets, the firm becomes the owner of the processes, though no assignment thereof is made by the inventor to the firm.⁴ If the employee has entered the receipts and processes in a book of his own he is entitled to keep it, though it seems the employer is entitled to a copy. A color-mixer in a carpet manufactory, without the knowledge of his employers, who has entered the receipts in his own instead of his employers' color-books, and, on the employee's discharge, his employers, believing the books their own, refused to let the employee take them away, it was held that the jury should be instructed, in an action by the employee for the detention, that the value of the receipts could not be considered in estimating the damages, and that, in considering violence in the detention as an element of damages, they must consider the negligent conduct of the employee, and that his employers were led thereby to believe that he was carrying away their own books.⁵ The employer has a right to the continued use, in his own business, of recipes for mixing colors, prepared by an employee whose duties require him to prepare mixtures of colors which will reproduce the shades indicated by designs submitted to him, and to enter the receipts in a book furnished for that purpose, and which are necessary for the immediate manufacture of the carpet designed, and its subsequent reproduction.⁶ The employer has recovered such receipt-books in trover from the employee.⁷

An owner of a process or invention for manufacturing an article, which was kept secret from all but confidential employees, may restrain former

¹ *Cases collected in* 4 Amer. & Eng. Ency. Law 178; Smith's Master and Servant 166-7, and *English cases cited*; see *Pape v. Lathrop* (Ind.), 46 N. E. Rep. 154 [1897].

² *Hulse v. Machine Co.* (C. C. A.), 65 Fed. Rep. 864.

³ *Clark v. Fernoline Chem. Co.*, 5 N. Y.

Supp. 190.

⁴ *Baldwin v. Von Micheroux* (Sup.), 25 N. Y. Supp. 857; accord *Dempsey v. Dobson* (Pa.), 34 Atl. Rep. 459.

⁵ *Dempsey v. Dobson* (Pa. Sup.), 34 Atl. Rep. 459.

⁶ *Makepeace v. Jackson*, 4 Taunt. 770.

employees from disclosing, or using in a rival establishment, their knowledge thereof, acquired while occupying such confidential relation; and it is immaterial that there was no written contract between them, or that at the commencement of the employment the employees were minors, and performed comparatively unimportant duties.¹

The mere fact of the employment does not give the title to a manuscript to the publisher. Whether one who is paid to write an article for a periodical, magazine, or cyclopedia can have copyright in the article so as to prevent the publisher from using it in book form or otherwise than for what it was written, depends also upon the agreement between the parties expressed or implied.²

220. Things Made or Created Outside of Office Hours.—What an employee writes or prepares outside of office hours or independently of the duties for which he is employed and paid, belongs to himself individually.³ A contract to give one's whole time, as a draughtsman to the interests of his employer, an architect, has been held not to be broken by doing a little work on holidays and at night for other parties, and, it may be added, for himself, so long as such work does not result in damage to the employer.⁴

221. Creations Made from Materials Collected while in Another's Service.—A draughtsman or engraver in the government employ can have no copyright in a chart prepared for the government;⁵ and it was so held of an artist that accompanied a government expedition.⁶ An assistant in an engineer's office who executes and completes a map in conformity with the general design furnished by his employer, who made rough sketches and supplied newspaper maps, official reports, etc., can have no copyright in the map.⁷

If the changes and improvements in a map are material, it is a new map, and must be copyrighted before it is published, in order to protect it from piracy.⁸

222. New Creation Made from Materials Collected by Others.—It seems that in making a map an engineer may take advantage of all prior publications, but he must not make a mere copy nor a servile imitation. He must bestow mental labor upon what he takes from other maps and charts, and subject it to such revision and correction as to produce an original result. He should not deny the use made of preceding works and the changes must be material, and not merely colorable. Whether the changes are merely

¹ *Little v. Gallus* (Sup.), 38 N. Y. Supp. 487, 1014; *Peabody v. Norfolk*, 98 Mass. 452; *Morrison v. Moat*, 9 Hare 255; 10 Amer. & Eng. Ency. Law 949.

² *Sweet v. Benning*, 16 C. B. 459; *Bishop of Hereford v. Griffin*, 16 Sim. 190.

³ *Copinger on Copyright* 127; *Drone on Copyright* 259; *Gill v. United States*, 16 Sup. Ct. Rep. 322; as to suggestions by employer, see *Sheppard v. Conquest*, 17

C. B. 427.

⁴ *Hermann v. Littlefield* (Cal.), 42 Pac. Rep. 443.

⁵ *Copyright*, 7 Opinion Att'y-Gen'l 656.

⁶ *Heine v. Appleton*, 4 Blatchf. (U. S.) 125; *Com. v. Desilver*, 3 Phila. (Pa.) 31.

⁷ *Stannard v. Harrison*, 24 Law Times 570; *Drone on Copyright* 254.

⁸ *Drone on Copyright* 145.

colorable, and the new work a mere servile imitation is a question for the jury in each case.¹ The change of a plain map to a mercator projection has been held not a servile imitation, but an original work. But the publication of a map at a smaller scale than the original was held a piracy.² A chart of township boundaries is a subject for copyright.³

The natural objects from which a chart is made, being open to the examination of all, a copyright cannot subsist as to the general subject. A right in such a subject is violated only when copies are made from the chart of him who has secured the copyright, and thereby avails himself of his labor and skill.⁴ The results of the labor of a draughtsman while in the service of the commonwealth, working at her cost, belong to the commonwealth, and the publication of a map made from materials collected while in such service will be restrained by injunction.⁵ A tradesman who employs another for pay, to complete a book of monumental designs for him is entitled to copyright in the book. The employee cannot publish designs copied from it.⁶

223. Employees Right to His Inventions.—Mechanical, civil and electrical engineers, chemists and mechanics, are inventors by trade. Poverty frequently requires them to accept employment under masters, less capable and less deserving, who profit from their labors and often appropriate the fruit of their inventive genius, sometimes rightfully, and frequently without any legal right whatever. In the absence of an express agreement that the inventions and improvements made by the employee shall belong to the employer, the latter can claim no rights to such inventions of the employee.⁷

Under Rev. St. § 4929, which authorized the issuance of a design patent to any person who, "by his own industry, genius, efforts, and expense, has invented," etc., the use of the word "expense" is not limited to mere disbursement of money, and does not prevent the granting of a patent to one who invents a design while in the employ of another, especially where it does not appear that any "expense" was necessary in producing the design.⁸ It does not matter that the improvements are in machines with which he is connected in his service.⁹ The employer has no right to inventions made by the employee after his term of employment has expired.¹⁰ If an engineer has been hired expressly to invent, an equitable title to his inventions will

¹ Copinger on Copyright (1st ed.), 90; Sayre v. Moore, 1 East 361.

² 3 Amer. & Eng. Ency. Law 139-140.

³ Farmer v. Calvert, etc., Co., 5 Am. L. T. Rep. 174.

⁴ Blunt v. Patten, 2 Paine 397 [1828]; Sanborn Map & Pub. Co. v. Dakin Pub. Co., 39 Fed. Rep. 266.

⁵ Commonwealth v. Desilver, 3 Philadelphia 31 [1858].

⁶ Grace v. Newman, L. R. 19 Eq. Cas. 623 [1875].

⁷ Smith's Master and Servant (4th ed.), 164; Hapgood v. Hewitt, 119 U. S. 226; Gill v. United States, 16 Sup. Ct. Rep. 322;

McWilliams Mfg. Co. v. Blundell, 11 Fed. Rep. 419; Niagara Radiator Co. v. Meyers (Sup.), 40 N. Y. Supp. 572; Green v. Willard Barrel Co., 1 Mo. App. 202; but see some early English cases; Bloxam v. Elsee, 1 C. & P. 558, before service began; Hill v. Thompson, 8 Taunton 395; Makepeace v. Jackson, 4 Taunton 770, color-printers' book of receipts recovered by employer in trover from employee.

⁸ Matthews Mfg. Co. v. Trenton Lamp Co. (C. C.), 73 Fed. Rep. 212.

⁹ Gill v. United States, 16 Sup. Ct. Rep. 322.

¹⁰ Appleton v. Bacon, 2 Black (U. S.) 699.

vest in his employer;¹ and an employee may make an assignment of inventions that are yet in embryo in his mind, or even make a general sale of the inventive power of his mind.²

Of course nice questions arise when an engineer is working with or under the eye of his employer, who may constantly make suggestions, frivolous and worthless perhaps, but which, when related in court, may be made to embody the whole invention and the engineer to appear as a subordinate under the direction and supervision of a natural born genius, the employer. There have been employers who have honestly won the name of inventor, and when it is proved, they are the more deserving of the glory and reward, having made the invention without the aid of the technical training which every engineer is supposed to have had. Such cases are the exception in these days.

When it is proved that the employer has made a new discovery and has hired engineers and agents to assist him in carrying out that principle, and they, in the course of the experiments arising from that employment, have made valuable discoveries accessory to the main principle, and tending to carry it out in a better manner, such improvements are the property of the inventor of the original principle, and may be embodied in his patent.³

224. What is Invention, and Who is the Inventor?—"Invention is the work of the brain and not of the hands. If the conception be practically complete, the artisan who gives it reflex and embodiment in a machine is no more the inventor than the tools with which he works. Both are instruments in the hands of him who set them in motion, and prescribes the work to be done. Mere mechanical skill can never rise to the sphere of invention. The latter involves higher thought, and involves and brings into activity a different faculty. Their domains are distinct. The line which separates them is sometimes difficult to trace; nevertheless, in the eye of the law, it always subsists. The mechanic may greatly aid the inventor, but he cannot usurp his place. As long as the root of the original conception remains in its completeness, the outgrowth, whatever shape it may take, belongs to him with whom the conception originated." So where an employer had drawn a design of an engine in the sand, and directed an employee or assistant to prepare the drawings and the engine was built, it was held that the one who drew the original design in the sand was the inventor.⁴ To claim the invention the employee must discover the principle of the machine or invent the important movements of it.⁵

The law has been very clearly laid down by Mr. Justice Clifford in the following words: "Persons employed, as much as employers, are entitled to their own independent inventions; but where the employer has conceived

¹ *Continental Wind Mill Co. v. Empire Wind Mill Co.*, 8 Blatchf. (U. S.) 295; *Joliet Mfg. Co. v. Dice*, 109 Ill. 649.

² *Cases in 18 Amer. & Eng. Ency. Law* 135; *Hulse v. Bonsack Mach. Co.* (C. C. A.), 65 Fed. Rep. 864.

³ *Per Earle, J., Allen v. Rawson*, 1 C. B. 567 [1845].

⁴ *Blaudy v. Griffith*, 3 Fish. 615 [1869].

⁵ *Bloxam v. Elsee*, 1 Car. & P. 567; *Allen v. Rawson*, 1 Man. G. & S. 551.

the plan of invention, and is engaged in experiments to perfect it, no suggestions from an employee, not amounting to a new method or arrangement which in itself is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement; but where the suggestions go to make up a complete and perfect machine, embracing the substance of all that is embodied in the patent subsequently issued to the party to whom the suggestions were made, the patent is invalid, because the real invention or discovery belongs to the employee. If the suggestions or improvements made by the employee are ancillary to the plan and preconceived idea of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original improved principle and may be embodied in his patent as a part of his invention. Suggestions from an employee made during the progress of experiments, in order that they may be sufficient to defeat a patent, must have embraced the plan of the improvement and must have furnished such information to the person to whom the communication was made, that it would have enabled an ordinary mechanic, without the exercise of any ingenuity and special skill on his part, to construct and put the improvement in successful operation."¹ And by Chief Justice Tindal in the following language: "It would be difficult to define how far the suggestions of a workman [engineer] employed in the construction of a machine are to be considered as distinct inventions by him, so as to avoid a patent incorporating them, taken out by the employer. Each case must depend upon its own merits, but when the principle and object of the invention are complete without it, it is too much that a suggestion of a workman employed in the course of the experiments, of something calculated more easily to carry into effect the conception of the inventor, should render the whole patent void."²

It is doubtful if an employer can claim or defend an invention first conceived and designed by an employee, even though the employee does acquiesce in his employer's application and permits him to go to the expense and trouble of obtaining a patent. When it is considered that the right to the patent is vested in the inventor, who must himself take the steps requisite to the grant of the patent, and that it is made necessary to the grant of a patent to an assignee that an assignment should be *previously* recorded and that the inventor should take oath to the specification, it can scarcely be doubted that, where the real author of the invention is any other person than the patentee, it is necessary that some contract capable of operating as an assignment should precede the issuing of the patent.³

Such a case is to be distinguished from that of a workman who is employed and paid by one who has conceived the principle and plan of an invention, and who relies on the ingenuity of another to enable him to per-

¹ *Agawam Co. v. Jordan*, 7 Wall 602.

² *Allen v. Rawson*, 1 Man. G. & S. 551.

³ See U. S. Rev. Stat. 4888; *Hogg v. Emerson*, 6 How. (U. S.) 437.

fect the details and realize his conceptions. If under a plea of the general issue, evidence should be offered that the patentee was not, but that a workman was, the real inventor, could the action be maintained without showing a written assignment or a written contract that would operate as an assignment, even if the real inventor had acquiesced in the patentee's application.¹

225. Instances of Invention between Employer and Employee.—A case in point was one where a husband was experimenting with turkeys' feathers, seeking to make them pliable and suitable for dusters; his wife suggested that he split them, which he did, and which was practically the solution of the whole difficulty; it was held that *he* was entitled to the patent. This case, however, has been criticised by Mr. Meriam in his book on Patentability of Inventions, p. 713, where he expresses the opinion that the wife was the true inventor, or perhaps the two were joint inventors.²

It has been held that an engineer may recover additional compensation for extra skill and labor bestowed in designing and making plans, if such extra work was not embraced in the original contract of employment nor in the duties thereby imposed. Thus when a contractor employs a person to superintend the construction of an engineering structure, and requests him to use certain ideas and means for its rapid and economical construction, which the employee had previously designed and planned even though at the contractor's request, the contractor is liable to the employee for the preparation of the plans and the extra time devoted during his employment to perfect and complete them.³*

It has been held that an employee, paid by salary or wages, who devises an improved method of doing his work, using the property or labor of his employer to put his invention into practical form, and assenting to the use of such improvements by his employer, cannot by taking a patent upon such invention recover a royalty or other compensation for such use. The fact that the employee made the invention out of working hours, and that he used neither the property of his employer, the government, nor the services of its employees in conceiving, developing, or perfecting the inventions, is immaterial, if the cost of preparing the patterns and working drawings of the machines, as well as the cost of constructing the machines that were made in putting the invention into practical use, was borne by the government, the work being also done under the immediate supervision of the employee.⁴

It is submitted that the rights of the employer in the improvements made amounts to a mere license, and that the inventor could enjoin any other party from making use of his inventions.

¹ *Allen v. Rawson*, 1 Man G. & S. 551.

² *Dull v. Bramhall*, 49 Ill. 364 [1868].

³ *National Feather-Duster Co. v. Hibbard*, 9 Fed. Rep. 558 [1881].

⁴ *Gill v. United States*, 16 Sup. Ct. Rep. 322.

* See Sec. 210, *supra*.

CHAPTER X.

LIABILITY OF ENGINEER OR ARCHITECT AS A PROFESSIONAL MAN.

MUST BE COMPETENT, SKILLFUL, AND MUST EXERCISE DUE CARE.

226. Engineer's or Architect's Employment Similar to that of Other Professional Men.—An engineer's or architect's employment is one which requires care and skill, and a contract for his services includes a reasonable degree of skill and knowledge of his profession. He must practice under the same rules and principles that apply to attorneys and physicians and to other professional men. His liability must, of course, be determined by his contract of employment, which, as before stated, is seldom set forth with any degree of certainty. Notwithstanding, if a person holds himself out to the public as possessing professional, peculiar, or competent skill, or offers his services in a professional capacity, which from its nature implies the possession of such skill, he will be liable to those who employ or rely upon him in that capacity and upon that supposition for the exercise of such skill.¹ The fact that the services are gratuitous does not relieve him; he is liable to the same extent as though the services were rendered for a reward.²

227. Undertaking of a Person Who Offers His Services in a Professional Capacity.—Judge Cooley in his book on Torts gives the law as laid down by the New Hampshire courts, that a person who offers his services to the community generally or to an individual for employment in any professional capacity as a person of skill, contracts with his employer: (1) "That he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community and by those conversant with the employment as necessary and sufficient to qualify him to engage in such business";³ (2) "that he will use reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge to accomplish the purpose for which he is employed; he does not undertake for extraordinary care or extraordinary diligence any more than he does for uncommon skill";⁴ (3) "in stipulating to exert their skill and apply their

¹ *Harmer v. Cornelius*, 5 C. B. (N. S.) 236 [1858].

³ Cooley on Torts 649.

² *Semble*, *People v. Campbell*, 82 N. Y. 247 [1880].

⁴ *Leighton v. Sargent*, 27 N. H. 460 [1853].

diligence and care, the medical and other professional men contract to use their best judgment."¹

This is believed to be an accurate statement of the implied promise. The practitioner must possess at least the average degree of learning and skill in his profession prevailing in the part of the country in which his services are offered to the public, and if he exercises that learning and skill with reasonable care and fidelity, he discharges his legal duty.²

228. That the Employee Possesses Skill is Implied from the Undertaking to Act.—The same rule applies to any other case requiring special or peculiar skill. If an agent undertakes, for a reward, the performance of such a duty, without possessing a reasonable and competent degree of skill, (in which fact the principal is ignorant, he will be liable to the principal for the loss or injury resulting therefrom.³ If, however, the principal had notice or knowledge of the agent's incapacity at the time of the employment, the agent will not be liable.⁴ No warranty of skill will be implied when the principal knows that no such skill is possessed. If he sees fit to employ an unskilled person he must be content with unskilled work; and the same is true where the agent is employed out of the line of his employment. If the principal sees fit to employ an auctioneer to conduct his case in court, or a surveyor to do his engineering, he cannot complain of his attorney's want of skill, unless the latter expressly warranted that he possessed it.⁵

229. Absolute Accuracy or Success Not a Test of Skill or Capacity of a Man in His Professional Capacity.—Absolute correctness in performing engineering operations cannot be made the test of the amount of skill required.⁶ Without a special contract, an architect or engineer does not warrant the perfection of his plans nor of the structure, nor its safety, nor its durability, any more than a physician or surgeon warrants a cure, or a lawyer guarantees the winning of a case.⁷ One who undertakes to make a map of a certain locality must furnish a map of substantial accuracy, but in the absence of a guaranty, it need not, it seems, be absolutely accurate.⁸

In the absence of an express agreement a physician does not even insure

¹ Cooley on Torts 649; Leighton v. Sargent, 27 N. H. 460 [1853]; Peck v. Hutchinson (Iowa), 55 N. W. Rep. 511; Hewitt v. Eisenbart (Neb.), 55 N. W. Rep. 252.

² Wilson v. Brett, 11 M. & W. 113; Stanton v. Bell, 2 Hawks (N. C.) 145; Varnum v. Martin, 15 Pick. (Mass.) 440; Stimpson v. Sprague, 6 Greenl. (Me.) 470; Crooker v. Hutchinson, 1 Vt. 73; Holmes v. Peck, 1 R. I. 242; Graubis v. Branden, 5 Day (Conn.) 260; Howard v. Grover, 28 Me. 97; Ayers v. Russell, 50 Hun 283 [1888], where a patient was adjudged insane; and see also Lange v. Benedict, 73 N. Y. 35, and cases cited.

³ Kirtland v. Montgomery, 1 Swan.

(Tenn.) 452; McDonald v. Simpson, 4 Ark. 23; Wilson v. Brett, 11 M. & W. 113; Shipman v. State, 43 Wis. 381; Money-penny v. Hartland, 1 Car. & P. 352; s. c., 2 C. & P. 378; Harmer v. Cornelius, 5 C. B. (N. S.) 236; McFarland v. McClees (Penn.) 5 Atl. Rep. 50.

⁴ Story on Bailment, § 435; Felt v. School District, 24 Vt. 297.

⁵ Meechem on Agency, § 496.

⁶ McCarthy v. Bauer, 3 Kan. 237.

⁷ Shipman v. State, 43 Wis. 381; Leighton v. Sargent, 27 N. H. 460 [1853]; and see Small v. Howard, 128 Mass. 131 [1880].

⁸ Munsell v. Baldwin, 56 Conn. 523 [1888].

that he will benefit his patient.¹ He is not responsible for want of success, unless it is proved to result from want of ordinary skill, or want of ordinary care and attention; nor is he presumed to engage for extraordinary skill or for extraordinary diligence and care; nor is he responsible for errors of judgment or mere mistakes in matters of reasonable doubt and uncertainty.² He is required to exercise only that degree of skill which is ordinarily possessed by members of his profession.³ He is charged with the consequences of mere errors only when such errors could not have arisen, except from want of reasonable skill and diligence.⁴ To recover for services he need not prove their value to the patient, but only the ordinary and reasonable value of like services.⁵ If a man assumes an unusually difficult or hazardous undertaking he is thereby required to exercise extraordinary care, diligence, and skill. It was so held of a contractor in the performance of his work, and should apply with equal propriety to a professional man, as an engineer, or an architect.⁶

230. Determination of Skill Possessed or Want of Skill.—How this reasonable degree of skill is to be determined is a question of importance. There are cases where its presence or absence is so palpable and unquestionable that the court may so declare as a matter of law. In cases where the facts are controverted, and the existence or non-existence of certain of them may fairly be presumed to affect the mind in any given exigency, the whole question of the existence of the facts, and the conclusions to be deduced from them is to be determined by the jury or other tribunal, by reference to all the circumstances of the case, including the subject-matter and other objects of the agency, and the known character, qualifications, and relations of the parties.⁷ The party asserting the negligence of the architect, or his want of skill, must prove it.⁸

231. Engineer's or Architect's Undertaking when He Accepts or Solicits an Engagement.—A professional engineer or architect undertakes and agrees then to perform several conditions when he accepts an engagement, viz.: (1) That he has the requisite skill and knowledge; (2) that he will use reasonable care and diligence in the exercise of his skill and the application of his knowledge; (3) that he will use his best judgment; (4) and, there should be added, the obligation which rests upon every person occupying a position of trust, as that of an architect or engineer, *that he will be honest*. Liability will attach for a failure to perform any one of these conditions if any injury result from such neglect or failure, and these conditions need not be the sub-

¹ *Styles v. Tyler*, 64 Conn. 432.

² *Leighton v. Sargent*, 27 N. H. 460 [1853].

³ *Uiley v. Burns*, 70 Ill. 162 [1873]; *in his locality*, *Whitesell v. Hill* (Iowa), 66 N.W. Rep. 894; *Chapman v. Walton*, 10 Bing. 63.

⁴ *Leighton v. Sargent*, 27 N. H. 460 [1853]; *Shipman v. State*, 43 Wis. 381.

⁵ *Mayor v. Bailey*, 3 Denio 433; *semble*, *Judge Cooley*, in 49 Mich. 153.

⁶ *Pennsylvania R. R. Co. v. Ogier* 35 Pa. St. 60; *Hubert v. Aitken*, 15 Daly 237; *Gill v. Middleton*, 105 Mass. 477; *Eddy v. Livingston*, 35 Mo. 493; *Grant v. Ludlow*, 8 Ohio St. 1; *Meechem on Agency*, § 500; *but see Vigean v. Scully*, 20 Ill. App. 437.

⁷ *Gillman v. Stevens*, 54 How. Pr. (N. Y.) 207.

ject of a special agreement. If a person solicits employment in a particular line of work, the act of solicitation is an assertion by the person seeking employment that he is competent to discharge all its ordinary duties. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite skill and ability.¹ If he engages in a certain business, as surveying, engineering, or architecture, the law will imply that he assumes to possess the requisite knowledge and skill, and that he undertakes to use due and ordinary care in the performance of his duty; and for a failure in either of these respects, resulting in damages to the party to whom he owes the obligations, he is liable for the injury.²

232. Professional Man must Possess Ordinary Skill and Exercise Ordinary Care.—He must exercise the ordinary amount of skill possessed by those of the same profession. It is immaterial how high his standing may be, if he has the skill and does not apply it, he is guilty of neglect; if he does not have it, then he is liable for the want of it. Two questions may present themselves: First, whether the practitioner possesses the ordinary skill of persons acting as engineer and architects, and, secondly, if he did, whether he was negligent in the application of his skill. Whether he possesses greater skill, or has been successful in applying it in other cases is wholly immaterial. He cannot show that he was generally reputed to possess a high degree of skill in his profession, when the employer does not allege or offer to prove that he lacked ordinary skill.³

If he does not adopt the established mode of treatment, and adopts one that proves to be injurious, evidence of skill or reputation for skill is immaterial, except to show what the law presumes, viz., that he possesses the ordinary degree of skill. It is of no consequence how much skill he may possess, if he has demonstrated a want of it in the case in question. The failure to use skill may be negligence, but when the methods adopted are not in accordance with the established practice of his profession, but is positively bad and injurious, the case is not one of negligence, but one of want of skill.⁴

233. Negligence or Failure to Exercise Reasonable Care and Diligence.—A failure to make a visit or inspection as promised at a certain time will sustain a finding of negligence in a physician (or engineer).⁵ In such case it seems that a physician is not liable for the unskillfulness of another physician which he has sent in his stead, the substitute being regarded as an independent contractor.⁶ He is not responsible for evil consequences due to his

¹ *Union Pac. Ry. Co. v. Estes* (Kan.), 16 Pac. Rep. 131 [1888].

² *Harmer v. Cornelius*, 5 C. B. (N. S.) 236 [1858].

³ *Chase v. Heaney*, 70 Ill. 268 [1863]; *Springfield C. A. v. Smith*, 32 Ill. 252 [1863].

⁴ *Carpenter v. Blake*, 60 Barb. 490 [1871]; 50 N. Y. 696, *explained*; *Degnan v. Ran-*

som (Sup.), 31 N. Y. Supp. 966; *Campbell v. Russell*, 139 Mass. 278 [1885].

⁵ *Carpenter v. Blake*, 60 Barb. 488 [1871]; *semble*, *Lottman v. Barnett*, 62 Mo. 159.

⁶ *Boon v. Reed* (Sup.), 23 N. Y. Supp. 421.

⁷ *Myers v. Holborn* (N. J.), 33 Atl. Rep. 389.

failure to send his patient a specialist, as he had promised to do, for a disorder other than the one which he was called to treat.¹

A case in point arose in a barber shop, where the barber, who shaved a postman, used inferior soap and caused eczema, and it was held no recovery could be had. The barber was responsible for want of care, knowledge, or skill, but if he had used ordinary care in choosing his materials [soap] there was no liability.²

234. Negligence on the Part of an Agent.—An architect or engineer as between himself and his employer is, in his usual capacity, an agent or servant. The rules for the liability of agents are thus laid down by Mr. Story in his book on Agency: "Whenever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority or by positive misconduct, or by negligence or omission in the proper functions of his agency, or in any other manner, and any loss or damage thereby falls on his principal, he is responsible therefor, and bound to make full indemnity. The loss or damage need not be directly or immediately caused by the act which is done or omitted to be done. It will be sufficient if it be fairly attributable to it as a natural result or just consequence."³ "It is the primary duty of an agent, whose authority is limited by instructions, to adhere faithfully to those instructions in all cases to which they ought properly to be applied. If he unnecessarily exceeds his commission, or risks the property of his principal, he thereby renders himself responsible to his principal for all losses and damages which are a natural consequence of his act, and it will constitute no defense for him that he intended the act to be a benefit to the principal."⁴ Therefore, when the principal directed his agent to send him \$300 in \$50 or \$100 bills and the agent sent the amount in bills of \$5, \$10, and \$20, which never reached the principal, the agent was held to have deviated from his instructions and to be liable for the loss;⁵ and again, where an agent was directed to send money by express, and instead he sent a check by mail, it was held he must answer to the principal for the amount of the check which proved to be worthless.⁶

Judge Cooley says: "Negligence is the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand."⁷

235. Negligence or Want of Care and Skill of a Professional Man.—A man who undertakes as a lawyer to conduct an action at law without possessing skill is negligent; and one who undertakes to treat a sick or

¹ Jones v. Vroom (Colo.), 45 Pac. Rep. 234.

² 36 Alb. L. J. 179.

³ Story on Agency, § 217, p. 259.

⁴ Walker v. Walker, 5 Heiskell (Tenn.) 428.

⁵ Story on Agency, § 192, n. 3.

⁶ Walker v. Walker, 5 Heiskell (Tenn.) 428.

⁷ 49 Mich. 153; Terre Haute v. Hudnutt, 112 Ind. 542; Harmer v. Cornelius, 5 C. B. (N. S.) 236 [1858]; Somerby v. Tappan, 1 Wright (Ohio) 570 [1834]; Anderson v. Whitaker (Ala.), 11 So. Rep. 919; Springfield C. A. v. Smith, 32 Ill. 252 [1863]; Downer v. Davis, 19 Pick. 72 [1883]; Sherman v. Bates, 15 Neb. 18.

wounded man as a physician or surgeon without possessing a fair degree of professional knowledge is guilty of a breach of duty.¹ A mechanic who undertakes to build a house is liable in damages if through his ignorance he does his work unskillfully.²

In keeping with the foregoing principles, it has been held that a cloak-maker was responsible for lack of skill and care in cutting garments from cloth;³ and a dyer for damages arising from his unskillfulness;⁴ that a workman who recommended himself as competent, and undertook to work as a master builder, could not recover for his services when his employer suffered loss through his unskillfulness or negligence;⁵ that one who represents himself as a builder, and as having a long and large experience in building, may be dismissed for incompetency, and his employer may recover from him for any damage sustained by reason of his deceit.⁶ If, however, a superintendent is employed by an owner who knows the habits and ability of the person so employed, his incapacity and lack of skill need not prevent him from recovering for his services.⁷

236. Skill Required of Specialists.—The same contracts are implied and the same rules of liability are laid down in case of physicians.⁸ One case held that when a patient called upon a clairvoyant physician, it was held that he should be treated with the ordinary skill and knowledge of physicians in good standing, practicing in the vicinity, and that instructions to a jury that he should be treated with the ordinary skill and knowledge of the clairvoyant system were properly refused and in error.⁹ So it has been held of attorneys.¹⁰ The right of action against an examiner of titles for negligence exists only in favor of the party to the contract. It does not inure to the widow of the employer,¹¹ nor to an assignee of the mortgage negotiated on the faith of such abstract.¹²

237. Skill and Care Required of Engineers and Architects—Instances.*—Architects and engineers have been held equally liable upon their implied representation that they possess the requisite skill, and upon their implied contract to exercise it. They are responsible for defective and insufficient

¹ *Terre Haute v. Hudnutt*, 112 Ind. 542.

² 49 Mich. 153.

³ *Parish v. Gilmore*, 33 Wis. 608 [1873].

⁴ *Woodrow v. Hawving* (Ala.), 16 So. Rep. 720.

⁵ *Gaslin v. Hudson*, 24 Vt. 140 [1852].

⁶ *Jones v. Vestry of Church*, 19 Fed. Rep. 59 [1883].

⁷ *Story on Bailments*, § 435; *Felt v. School District*, 24 Vt. 297 [1852]; *Jones v. Vestry of Church*, 19 Fed. Rep. 59 [1883].

⁸ *Carpenter v. Blake*, 60 Barb. (N. Y.) 488 [1871]; *Robinson v. Campbell*, 47 Iowa 625 [1878]; *Cooley's Torts* 649.

⁹ *Nelson v. Harrington* (Wis.), 40 N. W. Rep. 228 [1880]; *Pelky v. Palmer* (Mich.), 67 N. W. Rep. 561.

¹⁰ *Bridges v. Puig*, 13 Cal. 640 [1859]; *Missmanagement, Drals v. Hogan*, 50 Cal. 121 [1875]; *Examiners of titles, Rankin v. Schaeffer*, 4 Mo. App. 108 [1877]; *Roberts v. The Loan & Abstract Co.*, 68 Iowa 76 [1884]; *Chase v. Heaney*, 70 Ill. 268 [1873]; and *see* *Thomas v. Carson* (Neb.), 65 N. W. Rep. 899.

¹¹ *Schade v. Gerner* (Mo. Sup.), 34 S. W. Rep. 576.

¹² *Talpey v. Wright* (Ark.), 33 S. W. Rep. 1072.

* *See* Sec. 258, *infra*.

plans;¹ and have been held liable for defective work, such as foundations. They are bound not only to furnish proper plans, but to see that the structure is at least reasonably well constructed.² It has been held that a duty was required of them to cause foundations to be sufficiently deep and otherwise protected to prevent settling and the cracking of the walls of a building.³ An architect has been held liable for not having made a chimney-flue of sufficient dimensions. The fact that the chimney proved inadequate for the purposes for which it was designed was held to entitle the owner to a deduction from what was due the architect for his services.⁴ A builder has likewise been held liable for building a chimney that did not carry off the smoke.⁵

238. Owner may Offset His Damages against Sum Due Engineer or Architect for Services.—The damages sustained may support a counter claim against the architect, and be deducted from the amount due him under the contract of employment for drawing the plans and superintending the construction of the house; but such defects cannot be urged to defeat all recovery on the contract, the same having been performed according to its terms, unless the damage exceeds the amount to which the architect is entitled.⁶

An architect employed by the owner for reward to superintend the construction of a house is, as between himself and employer, answerable for either negligence or unskillfulness in the performance of his duty as architect. An architect sued for the balance due to him under an agreement with the owner for commission for his services in superintending the construction of a dwelling house; his claim was resisted, and damages also demanded upon a counter claim, on the ground that by his negligence and want of care and skill in the performance of the duty he had been retained to do and had undertaken to do, the contractor's work had been done in a defective and inferior manner as regards the construction of the building and the quality of the materials.⁷ In an action for his services, the architect employed to superintend the erection of a building and see that the builder properly fulfilled the conditions of his contract cannot excuse his neglect in

¹ *Niver v. Nash* (Wash.), 35 Pac. Rep. 380; *Ersine v. Johnson*, 23 Neb. 265; *Lake v. McElpatrick* (Sup.), 19 N. Y. Supp. 494, *reversed in*, 139 N. Y. 349; *Pierson v. Tyndall* (Tex.), 28 S. W. Rep. 232.

² *Shipman v. State*, 43 Wis. 381; *Money-penny v. Hartland*, 1 C. & P. 352; *Gilman v. Stevens*, 54 How. Pr. (N. Y.) 197; and *see Petersen v. Rawson*, 34 N. Y. 370; *Newman v. Fowler*, 37 N. J. Law 89.

³ *Shreiner v. Miller*, 67 Ia. 91 [1885]; *accord, Newman v. Fowler*, 8 Vroom (N. J.) 87.

⁴ *Hubert v. Altin* (N. Y.), 15 Daly 237; [1889]; and *see semble, Brown v. Burr* (Pa.), 2 Atl. Rep. 828.

⁵ *Somerby v. Tappan*, 1 Wright (Ohio) 570 [1834]; and *see Krebs Mfg. Co. v. Brown* (Ala.), 18 So. Rep. 659.

⁶ *Shreiner v. Miller, supra*; *Hubert v. Altin*, 15 Daly 237 [1889]; 14 Amer. & Eng. Ency. Law 781.

⁷ *Badgley v. Dickinson*, 13 Ontario App. 494 [1887]; the following authorities were cited: *Shiells v. Blackburne* 1 H. Bl. 158; *Hamilton Provident & Loan Society v. Bell*, 29 Gr. 203; *Canada Landed Credit Co. v. Thompson*, 8 A. R. 696; *Harmer v. Cornelius*, 5 C. B. (N. S.) 236; *Turner v. Goulden*, L. R. 9 C. P. 57; *Re Hopper*, L. R. 2 Q. B. 367; *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 72.

the performance of his duties by showing that the owner was about the premises during the progress of the work and must have seen the imperfections set up in defense of the claim.¹

In another case the architect sued for his fees and commission for drawing plans and specifications and superintending the erection of a house. He had given certificates to the builder greatly in excess of the proportion stipulated for by the contract, and the builder having subsequently failed, the owner was compelled to have the work done by others, at a higher price. It was held that he was entitled to deduct from the amount which would have been due to the architect the loss sustained by the latter's negligence in certifying for too much. The terms of the building contract are not stated in the report, though it is probable that they were the usual ones. The case was fully argued, but it does not appear to have been suggested that the plaintiff's position as arbitrator exempted him from responsibility for negligence under his own agreement with the defendant.²

The same law holds when an engineer is called upon in his professional capacity to make investigations, inspections, and estimates, and either from want of skill or negligence on his part, the report or estimate is incorrect; he is liable to his employer for unnecessary expense or injury occasioned.³ An engineer who made estimates of a bridge for a contractor without informing himself (by boring or otherwise) of the nature of the soil for the foundations, which proved to be bad, should not be allowed to recover for his services in making plans, estimates, and specifications if his employer has been damaged by a greater amount than what the services were worth. It is no excuse that he relied upon information and advice of another engineer, who had made experiments and investigated the soil; that when he was employed to estimate the expense of works he was bound to ascertain for himself by experiments the character of the soil; if he relied upon the information of others, which turned out to be false or insufficient, he was liable for the consequences; and the opinion was expressed that an engineer should not estimate work at a price at which he would not contract for it, for if he does he deceives his employer.⁴

239. Architect or Engineer must Give Such Careful Superintendence and Inspection as to Prevent the Contractor from Making Material Omissions and Variations.—When a building is to be erected according to the plans and specifications and under the superintendence of an architect, and to his satisfaction, payment to be made on the production of his certificate, the architect must bestow such care and attention that the carpenters and masons will not make any material variation from the plans and specifica-

¹ Lotholz v. Fiedler, 59 Ill. App. 379.

² Irving v. Morrison, 27 C. P. (Upper Canada) 242; *but see* Vigeant v. Scully, 20 Ill. App. 437; Shipman v. State, 43 Wis. 381, which held that monthly estimates need not be accurate.

³ *Mistakes in making a survey.* McCarthy v. Bauer, 3 Kans. 287; *but see* Halsey v. Hobbs (Ky.), 32 S. W. Rep. 415.

⁴ Moneypenny v. Hartland, 1 C. & P. 352 [1824]. 2 C. & P. 378 [1826]; *and see* Whitty v. Lord Dillon, 2 F. & F. 67.

tions which ordinary care and attention, when bestowed by a competent architect, would detect and prevent, or detect in time to be remedied.¹ If he fail to bestow such care and attention, and damages result to his employer, he loses his claim to compensation for so much, notwithstanding the owner may have a remedy against his contractor. This is true even though the owner may have settled with the contractor in full after the architect had refused to give his certificate, which the contract required as a condition precedent to payment for the work.²

When the contractor, by the terms of the contract, agreed to lay out his work himself, and made a mistake in the height of certain windows above the floors, and it has been proved that the architect has diligently superintended the progress of the work, it was held that such a defect was not chargeable to the architect under the circumstances of the case.³ This judgment was reversed in the superior court, and the case was carried to the court of appeals and the decision stated sustained, but with dissenting opinion. The ground of reversal was upon the question of fact whether or not "the architect was diligent in his attendance upon the building," and if he "had bestowed as much personal attention upon the building as was necessary, and that the variations mentioned were not caused by carelessness, negligence, or inattention on his part." Considerable stress was put upon the fact that the contractor was by the terms of his contract "to lay out his own work." The majority of the appellate court agreed with the referee, who had inquired into the case, that a mistake on the part of the builder by which windows in the front of the building were 2½ inches higher than those in the rear, was not such an error as the architect was bound to discover in his regular superintendence of the progress of the work. However, the rule laid down, that an architect is responsible for his failure to bestow such care and attention as shall detect and prevent material and important variations from his plans and specifications, remains unquestioned.⁴ It is the architect's duty to discover and guard against all such defects as can be prevented by the exercise of the ordinary skill and attention of a person of his profession and in his relation.⁵ The nature and extent of an architect's duties has been held to be a matter of fact, and not of law, to be determined by the jury from the evidence of the case, guided by proper instructions from the court.⁶

On the same ground, building inspectors who are required by a city ordinance to inspect buildings in the course of their erection, and to see that

¹ *Peterson v. Rawson*, 2 Bosw. (N. Y.) 234 [1857].

² *Peterson v. Rawson*, *supra*; *accord*, *Pierson v. Tyndall* (Tex.), 28 S. W. Rep. 232.

³ *Peterson v. Rawson*, *supra*.

⁴ *Peterson v. Rawson*, 34 N. Y. 370; *Shipman v. State*, 43 Wis. 381, is another

case that would have been in point but for the impertinent answers of the commissioners. It was lost on account of the pleadings.

⁵ *Gilman v. Stevens*, 54 How. Pr. (N. Y.) 197 [1877].

⁶ *Vigeant v. Scully*, 20 Bradw. 437.

the buildings are erected as provided by the ordinance, has been held liable to persons damaged by the nonperformance of a duty imposed upon them to require the building to be properly constructed.¹

240. Engineer and Contractor or Architect and Builder Jointly and Severally Liable.—If an architect is to oversee the erection of a house, and it is badly built, being defective in workmanship and materials in consequence of the joint neglect or want of skill of the architect and the contractor, an action will lie against either the architect alone or the contractor, or both, and the one sued may be held responsible for the entire detriment or injury occasioned. Nor can the one sued claim contribution from the other, so as to divide the loss equally between them, the principle of the law being that it will not undertake to adjust the burdens of misconduct. Nor will the fact that the owner has refused to pay a part of the money due to the contractor because the house was badly built bar such a suit against the architect. It is not a necessary consequence that the architect be responsible for every part of the neglect or misconduct of the contractor. He is responsible only when the negligence of the contractor was such as to have been discoverable by the exercise of reasonable care and skill on the part of the architect, and for the effects of negligence beyond this measure the contractor would be answerable alone.²

An architect is bound only to exercise reasonable care, and to use reasonable means of observation and detection in the supervision of the building, and when he appears to have done so, the mere fact that inferior material has been used by the contractor in some instances, and that the plumbing had been carelessly done, does not establish as a matter of law that he has not fully performed the contract.³ He is bound to exercise, for the protection of the employer, a reasonable degree of skill and care, and will be liable for any loss or damage occasioned by a failure so to do; yet an agent, architect, or engineer cannot be held responsible for unforeseen and unexpected losses or damage out of the ordinary course of business or of natural events, and not to be guarded against by reasonable diligence and foresight.⁴

The law presumes that an architect or engineer has done his duty, and the burden of proving to the contrary is upon the employer or person who alleges the architect's unfitness or negligence.⁵

241. Owner Not Liable for Misconduct of His Architect.—In general, no action will lie against the owner for misconduct of his architect who has been employed merely to prepare plans and specifications and to procure a builder to erect the building. In a case where an architect had made an

¹ *Merritt v. McNally* (Mont.), 36 Pac. Rep. 44.

² *Newman v. Fowler*, 37 N. J. Law 89 (8 Vroom) [1874].

³ *Hubert v. Aitkin*, 5 N. Y. Supp. 839.

⁴ *Johnson v. Martin*, 11 La. Ann. 27;

semble *Gilman v. Stevens*, 54 How. Pr. 127 [1877].

⁵ *Gaither v. Myrick*, 9 Mo. 118; *Lampley v. Scott*, 24 Miss. 533; accord, *Styles v. Tyler*, 64 Conn. 432.

estimate of the work and materials necessary, and had represented to the builder that they were correct, upon the strength of which the builder made a bid and entered into a contract, it was held he could not recover against the owner for the extra cost, the estimate having been greatly below the actual cost, that the amount of his recovery was limited to the contract price. To entitle the contractor to recover more than the contract price three things must be made out: (1) that the architect was the owner's agent; (2) that the architect was guilty of fraud or misrepresentation; (3) that the owner knew of it and sanctioned it. If these facts were not shown, and there had been misconduct on the part of the architect, the contractor's remedy must be against *him*.¹

A dictum apparently to the contrary was expressed in a later American case, in which an engineer regularly employed by a company in charge of the company's works, under whose direction and constant supervision the works were performed, was declared a special agent of the company (not the agent of the contractor) as to measurements and calculations made by him and his assistants, and if they were not correct, and extra and unnecessary work and expenditure should result, the loss ought not to fall on the contractor, but upon the company. The facts of the cases differ materially. In the latter case the contract expressly states the engineer to be the engineer of the company, although by its terms nothing could be done contrary to the stipulations of the contract without the written consent of the company; yet also by its terms the contractor was entitled to rely on the actual instructions and directions of the engineer within the scope of his authority.² These powers would make him an agent; but the cases may be distinguished further in that in the former case the estimates were made and submitted to the contractor before the contract was made, and the builder accepted them on faith, while in the latter case the estimates were a part of the contract and necessary to its performance.

A contractor who performs extra work upon the assurance of an engineer of the company that it will be paid for or allowed by the company without the authority of the company or the requisite formality prescribed by his contract cannot recover from the company; he must look to the engineer for compensation, if he recovers at all, which will depend upon what personal liability the engineer assumed in ordering work.³ There is, moreover, an element of negligence on the part of the builder in accepting the estimate of the architect, and in not making an estimate himself or having it made by the engineer of his own selection. Another case illustrates the element of negligence more strikingly, in which a builder had agreed to sign a contract to execute for a definite sum certain works described in some rough

¹ *Scrivner v. Pask*, L. R. 1 Com. Pleas Eq. 396 [1869].

Cas. 715 [1866].

² *Woodruff v. R. & P. Ry. Co.*, 108 N.

³ *Seymour v. Long Dock Co.*, 20 N. J. Y. 39 [1888].

sketches and verbal explanations of an architect. The architect subsequently sent to the builder a contract to perform, for the sum previously agreed upon, the works delineated and described in certain plans and specifications thereto annexed, and which differed materially from the works described in the rough sketches and verbal explanations on which the builder had made his tender. Having signed the contract and proceeded with the work, it was held that he was not entitled to any relief, that the mistake under which he had signed the contract was due to his own negligence.¹

242. Engineer and Architect are Liable to their Employer and to Nobody Else.—An agent is liable to no one except his principal (his employer) for damage resulting from an omission or neglect of duty, or want of skill or attention, even though such omissions be with a malicious intent to injure a third person and have that effect.² An architect or builder of a public work even is answerable only to his employer for any want of care or skill in the execution thereof. He is not liable to third persons for accidents or injuries which may occur after the completion of such work.³

A manufacturer is liable only to the purchaser of his goods for defective materials and for want of skill and care in the construction of the article sold. A third party injured may not sue the manufacturer⁴ unless the negligence is imminently dangerous to others, as when a druggist makes a mistake in labeling or compounding a medicine.⁵

A distinction has been made in law between a tort to a third person due to the omission of some act or obligation to the public, and the commission of some act amounting to a tort. When he omits to do some duty or obligation which he owes to his employer and which is a tort to a third person, he is *not* liable; but when he commits a tort which is an injury to any one, there is no reason why he should not be liable for his acts, as any one else. Therefore, when an architect having the general charge and superintendence of work adopted a certain method and means of construction and repair, and the plan was a bad one, or the supports were inadequate, and a disaster resulted which was attributable to misfeasance or negligence in a work which the architect undertook, and in which he failed to exercise the care and skill which the law imposed upon him, he was held responsible not only to his employer, but to workmen who were injured in consequence.⁶

When the superintendent of a plantation neglected and deliberately refused to keep a drain open on the premises of his employer, by reason of which neglect and refusal [omission] a neighbor's lands were flooded and great

¹ *Kimberly v. Dick*, 41 L. J. Ch. 38 [1871].

² *Feltus v. Swan*, 63 Miss. 415 [1884]; *Downer v. Davis*, 19 Pick. 72.

³ *Mayor v. Cunliff*, 2 N. Y. 165.

⁴ *Winterbottom v. Wright*, 10 M. & W. 109; *Losce v. Clute*, 51 N. Y. 494.

⁵ *Thomas v. Winchester*, 16 N. Y. 397.

⁶ *Lottman v. Barnett*, 62 Mo. 159; and see *Trustees v. Bradfield*, 30 Ga. 1.

damage done, it was held that the superintendent was not liable to the neighbor, and no action could be maintained against him;¹ but when an engineer in the act of running a railway line through a village drove a stake in one of its streets, over which a citizen fell and broke his leg, it was held that the tort was the personal act of the engineer in running the line, and in law it was the act of the company by whose authority and in whose service the work was done, and that the citizen had his election to seek his remedy against one party or against both parties jointly.²

243. Liability for Acts of Assistants.—The question frequently arises as to who is liable for the acts of assistants, sub-agents, or servants. It is a question of who employs or has the control of the person who commits the act. If an engineer selects an assistant on behalf of the company and with its authority, and as an employee of the company, the assistant is an employee of the company, even though he receives his instructions and is subject to the control of the engineer; but if the engineer has undertaken to do business or accomplish some task or undertaking for his employer, and he employs assistants on his own account to assist him in what he has undertaken, then the assistants are the representatives of the engineer only, and are responsible to him for their conduct, and the engineer is responsible to the company for the manner in which the work or business is done, whether by himself or his assistants. In the latter case, the engineer is in a position of an independent contractor, at liberty to perform the undertaking by the agencies of his own selection, and is responsible to his own principal for the due execution of the enterprise by the means he has selected.

The authority of the engineer to employ assistants on account of the company is frequently implied by the circumstances of the case, as when the chief engineer of a railroad company has been employed "to survey and establish" its line, it was held that he was authorized to employ the necessary subordinates and assistants on behalf of the company, and that they became by such act of hiring the servants of the company.³

It may be a matter of custom or precedence. Thus if the engineer's contract of service does not prohibit him from selecting or employing his assistants, he may show that it was the custom for engineers to hire their own assistants, in order to establish the relation of master and servant between the company and his subordinates.⁴

¹ *Feltus v. Swan*, 62 Miss. 415 [1884].

² *Grudger v. Western N. C. R. Co.*, 87 N. C. 525 [1882].

³ *New Orleans, etc., R. Co. v. Reese*, 61

Miss. 581; *Gillis v. Duluth, etc., R. Co.* (Minn.), 25 N. W. Rep. 603.

⁴ *White v. San Antonio W. W. Co.* (Tex.), 29 S. W. Rep. 252.

CHAPTER XI.

LIABILITY OF ENGINEER OR ARCHITECT WHEN HIS FUNCTIONS ARE JUDICIAL OR DISCRETIONARY.

244. Not Liable for Many Acts or Omissions when His Functions Are Judicial.*—What has been said thus far in the preceding chapter of the liability of engineers or architects has been with reference to them strictly in their professional capacity or when employed as agents or servants. In other capacities and for many acts or omissions, they may be relieved entirely from responsibility.

There are certain conditions and circumstances under which the law and the public good require that a man should be relieved from the consequences of his acts, within certain limits, and it happens that two of these conditions belong particularly to engineering and architectural practice. Either conditions may exist when he is a servant or employed professionally, so that what has been said in the early part of this chapter must be tempered and modified when such conditions exist. One of the conditions and circumstances mentioned is that surrounding a judge, in his judicial capacity. To administer justice with freedom and security a judge must be free to discharge his functions after the dictates of his own conscience, unaffected by fears of prosecutions by persons who may have been dissatisfied with his decisions. This has always been the established law, that a judge was shielded from all liability in the exercise of his judicial duties so long as he exercised them honestly. The justice and necessity of such a rule cannot be questioned, but this immunity from action is not confined to those only who sit as judges in court. It extends for the protection of every officer who is called upon to exercise duties which are in their nature judicial, or which are to be performed according to the dictates of his judgment.¹ †

Such duties when exercised by other than judges of the courts have been termed *quasi-judicial* or discretionary, but if they be judicial in their nature, the officer may be said to act judicially and he is exempt from liability for his own acts. What are judicial powers has been defined as authority to hear and determine questions in which the rights of persons or property or the propriety of doing an act are the subject matters of an adjudication. Official actions which are the result of judgment or discretion are judicial acts.²

¹ Meechem's Public Officers, § 588.

² Grider v. Tally, 77 Ala. 422; Meechem's Public Officers, § 588; Edwards v. Ferguson, 73 Mo. 686 [1881], many cases.

* See Secs. 179, 180, *supra*.

† See Secs. 172-180.

The fact that the person often or usually acts ministerially is immaterial; he is equally exempt from liability in those cases in which he acts judicially.¹ The principle embraces the actions of arbitrators in their decisions upon the controversies submitted to them;² of jurors in their deliberations and verdicts; of aldermen in determining who shall be given a contract for work.³

245. Attempts have been Made to Discriminate between Judges in Court and Judicial Officers.—"An attempt," says Dillon in his *Municipal Corporations*, "has been made in some cases to make a distinction between those officers whose duties lie outside the domain of courts—the so-called *quasi-judicial* officers—and the judges of courts, to the effect that while the latter are exempt, the former may be made liable if their motives were corrupt or malicious."⁴ This distinction however he believes not to be well founded. If the action is really judicial, the immunity which adheres to judicial action should be applied whether the officer sits upon the bench of a regular established court or not. If the action can be maintained by the allegation of improper motives, no litigant would fail to allege them, and the public officer might be constantly called upon to defend himself from actions brought with motives fully as malicious as those which are alleged to have inspired him. Public policy requires that all judicial action shall be exempt from question in private suits, and the best considered cases so declare the rule.⁵ The reasons given apply with equal force to all judicial action, to arbitrators,⁶ to *quasi-judicial* officers,⁷ and to members of a common council who have willfully and corruptly refused to accept a bidder's proposal for doing certain public work. It is said "to be the well-settled rule of law that no public officer is responsible in a civil suit for a judicial determination, however erroneous or wrong it may be, or however malicious even the motive which produced it."⁸ In another case the rule was said to extend to judges from the highest to the lowest; to jurors and to all public officers whatever name they bear in the exercise of judicial power.⁹

246. Engineer's or Architect's Judicial Status.—It is a universal custom in construction contracts to constitute the engineer or architect a referee, umpire or arbitrator for the determination of questions in dispute, or of matters of facts necessary to be determined in order to complete the works or to pay for them. In determining such questions the engineer or architect acts judicially. He is in much the same position as a judge, and should

cited by Attorneys for Apellants; *Board of Regents in erecting school buildings*, Wall v. Trumball, 16 Mich. 228; *Assessor*, Siebe v. San Francisco (Cal.), 46 Pac. Rep. 456.

¹ Meechem's Public Officers, § 588.

² Jones v. Brown, 54 Iowa 74; Pappa v.

Rose, L. R. 7 C. P. 525.

³ East River Gas L. Co. v. Donnelly, 25 Hun 614; see Dillon's Municipal Corp'ns.

⁴ Hoggatt v. Bigley, 6 Humph. (Tenn.) 236; Baker v. State, 27 Ind. 485; Chicker-

ing v. Robinson, 3 Cush. 543; Gregory v. Brooks, 37 Conn. 365.

⁵ Meechem's Public Officers, § 588; Bradley v. Fisher, 13 Wall. (U. S.) 335.

⁶ Jones v. Brown, 54 Iowa 74.

⁷ Chamberlain v. Clayton, 56 Iowa 331.

⁸ East River Gas L. Co. v. Donnelly, 93 N. Y. 557; *semble*, Jones v. Brown, 54 Iowa 74.

⁹ Weaver v. Devendorf, 3 Den. (N. Y.) 117; Turpen v. Booth, 56 Cal. 65.

have the same protection. His judgment should be rendered free from the dictations of other judges; it should be a result of his own honest convictions and studied conclusions; he should act without fear of subsequent penalty, and should be exempt from annoying litigation before other tribunals on account of his decisions. Such is the established law. The engineer or architect need not be an arbitrator in the strictest sense, it is enough if he be in the position of an arbitrator; if he be a person by whose decisions two parties, having a difference, have agreed to be bound. If he undertakes to give a decision between two parties as to any matter, though he may not be an arbitrator in a strict sense of the word and is not bound to exercise all the judicial functions that an arbitrator would have to exercise, nevertheless he is not liable to an action for want of skill.¹

✓ In such cases it was found so difficult to discriminate between want of skill and negligence that it was later held that the engineer or architect, when acting judically as a referee, is not liable for want of care or negligence; that the parties having submitted questions for his determination and having agreed to be bound by his decisions, must abide by it.² It has been intimated by excellent authority that an arbitrator would not be liable to an action even for misconduct, and he sustained the proposition by the statement that he could find no case in which such an action had been brought.³ Justice Brett, in regard to the referee being a professional man, said: "I apprehend that the principle of law which forbids an action for want of skill or care against an arbitrator or a *quasi*-arbitrator is just as applicable to a skilled or professional arbitrator as to one that is unskilled and unprofessional, and that the fact of its being his business makes no difference. This case must occur constantly. It must constantly happen that parties are dissatisfied with the decision of an arbitrator or *quasi*-arbitrator, and yet we find, notwithstanding the facility with which speculative actions for negligence are brought on the slenderest grounds, that there is no precedent for such an action for negligence, and I am not disposed to lay it down for the first time that such an action is maintainable."⁴

No action can be brought by the contractor at law, against the engineer for not certifying, where the contractor's remuneration has been made, by his contract, contingent upon his obtaining the engineer's certificate that the work bargained for has been executed, if the engineer was not a party to the contract, even though the engineer's refusal to certify has been the result of fraud or even of collusion with his employers. The proper course for the contractor to adopt is to proceed against both the engineer and company; whether in a court of equity or at law he must include the company who contracted with him.⁵

¹ Pappa v. Rose, L. R. 7 C. P. 32, 525.

² Tharsis S. & C. Co. v. Loftus, L. R. 8 C. P. 1 [1872].

³ Watson on Arbitration [3d ed.], 112; Speck v. Phillips, 5 M. & W. 283.

⁴ Tharsis Sulphur & Copper Co. v. Loftus, L. R. 8 C. P. Cas. 1 [1872]; Pappa v. Rose, L. R. 7 C. P. 32, 525.

⁵ Speck v. Phillips, 5 M. & W. 283.

247. Engineer or Architect Must Not Act Fraudulently.—The misconduct must not amount to fraud or collusion with one of the parties against the interests of the other party. For a later English case is authority for the statement that an action of tort will lie by a contractor against an architect who fraudulently and in collusion with the owner refuses to certify that he is satisfied with the work done, whereby the contractor is unable to obtain payment for his work.¹ No such action had previously been allowed, but an action had been allowed for maliciously inducing another to break a contract,² and the action was permitted on that precedent. An opinion has also been expressed that an action would lie against parties who fraudulently prevented the architect from giving his certificate.³ In the absence of fraud or collusion, the contractor has no remedy against the engineer or architect.⁴

In a comparatively recent case, in which a contractor brought suit against an architect, an allegation that the contractor had signed the contract under the belief and expectation, as the architect knew, that he, the architect, would use due care and skill in making his estimates, but that he did not use due care and skill in ascertaining the quantities, and neglected and refused to ascertain them in the manner provided, and had certified knowingly and negligently for a much less sum than was the net balance payable to the contractor, was held not a sufficient allegation of fraud to sustain the action. That the functions of the architect in ascertaining the amount due the contractor were not merely ministerial, but such as required the exercise of professional judgment, opinion and skill, and that he therefore occupied the position of arbitrator against whom the action would not lie, no fraud or collusion being charged.⁵ A further allegation that the architect refused to reconsider the certificate and estimate and to allow the contractor to point out to him the errors in the bills of quantities, gave him no more rights to an action against the architect.⁶ The judge said: "I do not intend to hold that to all intents and purposes the architect is an arbitrator, but I think the duties are analogous to those of an arbitrator. His duties are matters of judgment requiring the exercise of opinion and discretion; and it appears to me that the architect in this case is an arbitrator to this extent, that he is from beginning to end to keep an eye on the work, in order to exercise a judgment in the matter."⁷ If fraud, collusion, or bad faith had been charged, the court expressed the opinion that an action could have been had against the architect; and it seems one could have been maintained if the architect's

¹ *Ludbrook v. Barrett*, 36 L. T. R. 616 [1877], see also *Byrne v. Sisters of Elizabeth*, 16 Vroom 213; *Chism v. Schipper*, 51 N. J. Law 1 [1888]. Atty's arguments.

² *Lumleg v. Gye*, 2 E. & B. 216.

³ *Milner v. Field*, 5 Exch. 829; *accord*, *Batterby v. Vyse*, 2 H. & C. 42.

⁴ *Clarke v. Watson*, 18 C. B. (N. S.) 278

[1865].

⁵ *Stevenson v. Watson*, L. R. 4 C. P. D. 148 [1879].

⁶ *Stevenson v. Watson*, *supra*.

⁷ *Pappa v. Rose*, L. R. 7 C. P. 32, 525. *The Tharsis Sulphur & Copper Co. v. Loftus*, 42 L. J. Rep. (C. P.) 6, and cases cited.

damages had been merely ministerial. Russell, in his *Law of Awards*, lays the same law down, and says: "An action will not lie against an arbitrator for want of skill, or of negligence in making his award, nor for the like cause against an engineer or architect employed to determine matters as a quasi-arbitrator; but an action will lie for fraudulently withholding his certificate, under which the contractor was entitled to payment, though no costs be prepaid against the engineer."¹

When an engineer is made a co-defendant with his company, he is not in general bound to give his reasons for making his award. An award may be a bar to some recovery in a suit in equity, but if fraud, corruption, or partiality be alleged, they must support a reply by an answer showing themselves to be impartial and not corrupt, for it would be inequitable to leave them at liberty to cover their own misbehavior by their own award. So if fraud or collusion are imputed, and the certificates are declared insufficient, and certain items specified as evidence of the fraud, the engineer cannot protect himself by his character of arbitrator, by denying the fraud in general; in his answer he should answer as to the particular items specified.²

248. Engineer is Liable to His Employer, when He may Not be Liable to Contractor.—A later decision, based after a careful review of the authorities, lays down the same law, but distinguishes between an action against the architect by a contractor and one by his employer. With the contractor there is no implied contract to exercise an ordinary degree of care and skill, while with the owner he is in the same position as any other professional or skilled person, and is responsible if he omits to perform his work with an ordinary and reasonable degree of skill and care, whether it be in the preparation of plans and specifications or in the doing of any other professional work for reward.³ In delivering the opinion, his lordship, the justice, said: "I am prepared to rule that you cannot recover any damages from the architect for any loss you have sustained in having a poor building without fraud. The only question that you can show is that he has not done the work for which he charged; that is all. The case is exactly the same as one in which there is an arbitrator. I have always thought the position of an arbitrator a most absurd one. He has powers given to him that are given to no other being in the world, and it results in hard feeling and litigation; but the parties, if they choose to enter into such a contract, must abide by it. Having put him in the position of sole arbitrator, they have to show, if they want to hold him liable, not that he had exercised a very poor judgment, or that he is unskillful, but that he has been dishonest and fraudulent. If you can show me he did not do the work for which he has charged, he cannot recover. If you show he did it negligently, I am afraid you have

¹ *Stevenson v. Watson*, 48 L. J. (N. S.) 818 [1879].

² *Russell Law of Awards* 497.

³ *Russell Law of Awards* 502.

⁴ *Badgley v. Dickson*, 18 Ont. App. 494 [1887].

no action. The present case is, in my opinion, broadly distinguished from those relied upon by the contractor in support of his claim. The principle affirmed or established by those cases is, that it is not consistent with public policy that an action should lie against an arbitrator or *quasi*-arbitrator, whose functions are of a judicial nature, for negligence or want of skill in the performance of his duty as such. The justice and expediency of such a rule is manifest. When two parties agree to be bound by the decision of a third party on a matter in dispute between them, or upon which a liability is to arise on the part of one of them, they take him, as it is said, for better or worse, and there is no implied obligation on his part to bring any particular amount of care and skill to the performance of the duty, if he undertakes it. All that is required of him is, that he shall act honestly and faithfully to the best of his judgment."

As a professional engineer, "he was bound to exercise ordinary care and skill, but when he became the person who was to determine a dispute, he was a person filling a position which brought him within an exception well known to the law of England, viz., that a person who is appointed, and is acting as an arbitrator to determine a matter in difference between two or more persons, does not enter into an implied promise to bring to the performance of the duty entrusted to him a due and reasonable amount of skill and knowledge. The question is one of implied undertaking, and the law says there is none such."

The case of *Stevenson v. Watson*, 4 C. P. D. 148, was an action of a contractor, under a building contract, against the architect of the building for not using due care and skill in measuring quantities and ascertaining the amount to be paid by the owners, and for negligently certifying for a much less sum than the balance due to the plaintiff. The contract (to which the architect was not a party) substantially provided that the contractor and the owners should be bound to leave all questions or matters in dispute which might arise during the progress of the works to the architect, whose decisions would be final and binding upon all parties, and that the contractor would be paid upon the certificate of the architect. It was held that the architect was not liable, on the ground, as stated by Lord Coleridge, C. J., that it was within the authority of the cases which decide "that where the exercise of judgment or opinion on the part of the third person is necessary between two persons, such as a seller and buyer, and in the opinion of the seller that judgment has been exercised wrongly, or improperly, or negligently, or ignorantly, an action will not lie against the person in that position." It was pointed out that there was no direct contract between the contractor and the architect, and Justice Denman said that it appeared to him that the architect did not, by undertaking the office of arbitrator, undertake any duty amounting to more than that of honestly performing his functions.

¹ Brett, J., in *Papa v. Rose*, L. R. 7 C. P. 40.

In all these cases and others which might be cited of a similar nature, it will be seen that the action was against the arbitrator, founded upon the breach of a supposed implied undertaking to perform his duty as such with an ordinary degree of care and skill, and the action failed because no such undertaking was implied by law, and there was no contract, expressed or implied, between the parties out of which any other duty or liability could arise. In this case the act and counter-claim are based upon a distinct contract, by which the architect was employed as a skilled professional person to perform certain services for reward, and he is not, in my opinion, absolved from the usual obligations attaching to such a contract between his employer and the builder. He may as arbitrator have determined between them as to the performance of that contract, in a manner which assumes that he has properly performed his own duties.¹

249. Engineer or Architect may Owe a Double Duty to His Employer, viz., as an Arbitrator and as a Professional Man.—It is said to be an anomaly that while the plaintiff cannot be sued in his character of arbitrator or *quasi*-arbitrator, he may yet be liable for a loss occasioned by his want of skill or want of care in another form of action. The answer simply is that he has entered into a contract which makes him so. It would be an extraordinary result if we were obliged to hold that the contract which the owner makes with the architect for his own protection is neutralized by or inconsistent with a provision introduced into a different contract between the owner and the builder for the purpose of preventing or settling disputes as between themselves. As architect he is in the same position as any other professional or skilled person, and whether it be in the preparation of plans and specification, or the doing of any other professional work for reward, he is responsible if he omits to do it with an ordinary degree of care and skill.²

The case is authority for the statement that the owner does sacrifice other rights and privileges, and it is not clear why he might not sacrifice his contract rights as well. The architect is responsible to his owner for the defective and inferior manner in which the work had been done, and the inferior materials employed, which was the result of his negligence and want of care and skill in the performance of the duty which he had been retained to do, and which he had undertaken to do.¹

The application of the rule seems to have been anticipated in a recent Illinois case, but it was distinctly decided that he was bound only to exercise so much care and skill as he had bound himself to bestow upon the work. That it was not a question to be left to the judgment and caprice of the jury to determine how much care and skill ought to be exer-

¹ *Badgley v. Dickinson*, 13 Ontario App. 494 [1887].

² *Badgley v. Dickinson*, 13 Ontario App. 494 [1887]. It is submitted that this may be true enough, but would he be responsi-

ble to his employer for want of skill or negligence in the performance of a judicial act, such as an estimate of work, by which both parties have agreed to be bound.

cised by an architect in superintending a building, but that the jury should decide from the evidence introduced what were the duties undertaken by him in his contract of employment and required of him by the contract of construction.¹ It was therefore held wrong to instruct the jury that a duty was imposed upon the architect to make a special inspection of the work to satisfy himself that the particular work for which the certificate was asked had been done properly and according to the plans and specifications before issuing his certificate, no such specific duty being imposed by the terms of the contract.¹

In a case where general averages were incurred in a ship's voyage, and it became necessary to adjust the losses, and it was agreed to refer the matter to an average adjuster, it was held that the adjuster was not liable for want of care in the performance of his duties, as he was acting in the capacity of an arbitrator between the parties.²

249A. Engineer's or Architect's Knowledge Is the Employer's Knowledge.—To be excused from negligence under Judge Cooley's definition there is another duty which an employee owes to his employer, and that is a due and proper notice of those conditions and things which precaution and vigilance would prompt him to give. Of all classes of employees there are few on whom this duty is more incumbent than upon the engineer and architect. It is one of the chief functions of his office.

It does not, it seems, matter how the engineer obtains his information, if he obtains his knowledge while acting for his employer, and afterwards, while acting further, fails to communicate it, the employer is as fully bound as if the communication had been made. The possession of knowledge, however acquired, when acting for the employer, is knowledge to the principal.³ The agent's obligation is just as strong to disclose knowledge when derived in a transaction for his own benefit as in a transaction for the benefit of his employer. What binds the principal is the knowledge possessed by the agent when he comes to acts, and the principal is bound in such case whether it is communicated or not, and without regard to the mode in which he acquired it.⁴ However, it is usually held that notice to an agent before the agency begun or after it is terminated will not affect the employer, and the notice should be within the scope of his agency or employment.⁵

"It is a neglect of duty in an employee not to give notice to the proper officers of his company of any fact affecting the performance of the duties of the company to the public occurring within the department under his supervision."⁶ It was so held when a conductor failed to report the

¹ *Vigeant v. Scully*, 20 Bradwell (Ill. App.) 437 [1886].

² *Tharsis S. & C. Co. v. Loftus*, L. R. 8 C. P. Cas. 1 [1872]; and see 69 Iowa 541; 2 Dillon's Munic. Corp'ns, § 237. note.

³ *Union Bank v. Campbell*, 4 Hun 394.

⁴ *Tagg v. The Tenn. Nat'l Bk.*, 9 Heisk. 479 [1872].

⁵ 1 Amer. & Eng. Ency. Law 421.

⁶ Judge Cooley, in *Davis v. Detroit & Mil. R. Co.*, 20 Mich. 105 [1870].

incapacity of his engineman,¹ and when a track-repairer failed to advise his company of the condition of the road-bed. If he knows, or by the proper discharge of his duty should know, of certain defects, his knowledge, or that which he might have acquired, may be imputed to his employer, the railroad company.²

The same rules, without doubt, would hold with regard to an engineer's knowledge of the road and structures of a corporation. It has been held that a company was chargeable with knowledge and negligence for failing to repair, when one of its employees, whose duty it was to observe the condition of its bridges, or keep them in repair, had actual or even implied notice of defects therein, or when, by the exercise of reasonable diligence, the employee would have known of them.³ So it has been held that a notice to an engineer appointed by a company to supervise and direct work of an alteration in the structure, supposed by the builders to be an improvement, is a notice to the company.⁴

To impute knowledge to a corporation such as would imply a ratification or an assent to the acts, admissions, or declarations of an engineer in its employ requires something more than the knowledge of the engineer that the work was being done or that it had been done by his orders.⁵

The status of an engineer or architect and his relations to his company or employer when he is on the witness stand deserves a passing notice. The engineer or architect enjoys no such privileges in court as his brother attorneys or physicians, though he be employed in a professional capacity. Communications between him and his employer are not, it seems, privileged. He may be required to testify in regard to matters and communications between himself and his employer, and may be required to produce letters he has written to his employer, even though they be of a private and confidential nature.⁶ The same is held of a banker⁷ and of clerks and servants in general.⁸ Nor is the architect or engineer regarded as a confidential agent of his employer so as to be liable for disclosures in regard to his employer's intentions to build,⁹ or where he is to build,¹⁰ if he has neither agreed nor been requested to keep such facts secret. It might be a ground for discharging him if he were a servant in the owner's regular employ.*

¹ *Davis v. Detroit & Mill. R. Co.*, *supra*.

² *Porter v. Han. & St. J. R. Co.*, 71 Mo. 66 [1879].

³ 46 Iowa 109; *semble*, *Indiana B. & W. Ry. Co. v. Adamson* (Ind.), 15 N. E. Rep. 5 [1888].

⁴ *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151 [1850]; and *see* *O'Brien v. Mayor* (N. Y. App.), 35 N. E. Rep. 323; and *Halsey v. Hobbs* (Ky.), 32 S. W. Rep. 415.

⁵ Many cases cited by counsel in *Wood-*

ruff v. Rochester & P. R. Co., 108 N. Y. 39; *Wolf v. Des Moines & Ft. D. R. Co.*, 64 Iowa 380; *Renton v. Monnier*, 77 Cal. 449.

⁶ *Page v. Ward*, W. N. 1869-51.

⁷ *Lloyd v. Freshfield*, 2 C. & P. 325.

⁸ 19 Amer. & Eng. Ency. Law 155-156.

⁹ *Havens v. Donahue* (Cal.), 43 Pac. Rep. 962.

¹⁰ *Green v. Brooks* (Cal.), 22 Pac. Rep. 849; but *see* *Wills v. Abbey*, 27 Tex. 202.

* *See* Sec. 204, *supra*.

CHAPTER XII.

LIABILITY OF ENGINEER OR ARCHITECT WHEN A PUBLIC OFFICER.

250. Position of a Public Officer.—Another capacity in which one is exempt from liability for the want of care (?) and skill is that of a public officer. What has been said of judicial or discretionary duties in general applies equally to public officers when their duties are judicial or discretionary, but there are further considerations in the case of public officers not present in the employment of the private individual. If public officers were liable for the want of skill and capacity, or were likely to be called upon to meet obligations which they assume on behalf of and for, the benefit of the public, it is safe to say that the full ranks of office-seekers would be greatly reduced. An officer who has been elected to his position, and who must undertake every task presented within the scope of his duties, and who has no choice as to whether he will act or decline to act, and who must serve whoever calls upon him, is in a different position from a servant or professional man who solicits employment, and can serve or not, as he will. The former is not subject to an action at law by an individual unless he has failed to perform some duty which he owes specially to that individual.*

The irresponsibility of public officers is often a source of aggravation to a private person, who may be required to stand outside of an iron partition and pay his taxes, or settle damages, while the county treasurer¹ or city engineer² within the cage smilingly tells him he is "very sorry, but that he can't help it, for mistakes will happen." No doubt better service would be had if public officers were responsible to individuals for their misconduct and incapacity in office, where such individual has suffered in consequence thereof; but public policy seems to require that they should be exempt from civil action, and that they be liable only through public prosecution.³

Officers acting in a judicial capacity are exempt from liability for their act.[†] They are not liable for injuries to persons when the act is purely ministerial if they act within their authority and it is done with due care. However, the general exemption of an officer from liability for negligence, want of skill or care, holds only when the officer is acting in a governmental or political capacity,⁴ and there are many cases which deny the exemption alto-

¹ See *State v. Harris*, 89 Ind. 363.

² See *McCarthy v. Bauer*, 3 Kans. 237 [1865].

³ 19 Amer. & Eng. Ency. Law 483.

⁴ 19 Amer. & Eng. Ency. Law 484, cases cited.

* See Sec. 36, *supra*.

† See Secs. 244-249, *supra*.

gether, except when the act complained of is a judicial act or one involving the discretion of the officer.¹

251. County Officers and their Liability.—County officers are frequently held not liable in civil actions for injuries sustained and caused by the neglect, want of care, or lack of skill of the officer. It has been held that the judges and justices of a county court were not liable for injuries to a traveler from the falling of a bridge constituting a part of the public highway and under the control of the court, even if they were guilty of gross negligence in failing to repair the bridge or give proper notice of its condition.² In England no action lies against the county surveyor for damages resulting from the want of repair to a county bridge,³ and a county treasurer in levying taxes has been held not liable for his failure to properly distribute the taxes between the real property of a mortgagor and the personal property of the mortgagee.⁴

252. County and Municipal Officers Compared.—The liability of a municipal officer as distinguished from that of a county officer, has been based upon the distinction between municipal corporation and county organizations, described as follows: "Counties are local subdivisions of a state, created by the sovereign power of the state of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces; the latter is superimposed by a sovereign and paramount authority. A municipal corporation proper is created mainly for the interest, advantage, and convenience of the special locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large for purposes of political organization, and civil administration in matters of finance, of education, of provisions for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organizations have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy."⁵ According to the principles of the common law, an action for indemnity cannot be maintained against the county court or against the judges individually for personal liability.

253. Liability of a Public Officer for the Acts of His Assistants.—Public officers of the government are not liable for acts of assistants and subordinates. Persons acting in the capacity of public agents, engaged in the public service and acting solely for the public benefit, although not strictly filling the character of officers or agents of the government, are also exempt from liability. Thus it has been held that overseers of highways intrusted

¹ 19 Amer. & Eng. Ency. Law 484.

² *Wheatley v. Mercer*, 9 Bush (Ky.), 704 [1873].

³ *M'Kinnon v. Penson*, 8 Exch. 319 [1853].

⁴ *State v. Harris*, 89 Ind. 363.

⁵ *Commissioners of Ham. Co. v. Mighels*, 7 Ohio St. 109; *Wheatley v. Mercer*, 9 Bush (Ky.) 704.

with the supervision of highways, discharging the duties gratuitously and being personally guilty of no negligence, are not responsible for an injury sustained by an individual through the negligence of workmen employed under them.¹ Trustees and commissioners acting gratuitously for the benefit of the public and intrusted with the conduct of public works are not liable for an injury occasioned by the negligence or unskillfulness of workmen and contractor necessarily employed by them in the execution of the work.²

In keeping with this policy, a surveyor of highways elected by the town as a public and not a municipal officer, has been held liable in damages for his wrongful acts only when they are wanton, malicious, or improper acts in making or repairing highways in his district;³ a superintendent of streets in a city has been held liable for damages resulting from his negligence or unskillfulness in repairing a sewer, notwithstanding his official capacity;⁴ and a building inspector for nonperformance of his duties, which required him to inspect the buildings and see that they were erected as provided by ordinance.⁵ A clause in a contract for the construction of a sewer which guarantees the street superintendent and his sureties immunity from liability does not render the contract void, as it could not affect persons injured by the acts of the superintendent.⁶

254. State Employees Held Liable for Negligence.—A superintendent of repairs of the state canals has been held personally liable for damages sustained by an individual through the negligence of workman making repairs. To have an action for his failure to make repairs, it must be shown, however, that it was the superintendent's duty to make repairs, that he had funds to make them with, and that he was the officer to make them; but negligence and mismanagement alone need be shown for misconduct in making repairs.⁷ The same has been held of an officer who was charged with the duty of keeping a street in repair.⁸ So, too, when the state canal board let the repairs of the state canals by contract to a contractor invested with the powers of a non-judicial officer, the latter was held liable to one who sustained special damage from a neglect to do his duty and fix a lock-gate that was defective and out of repair.⁹ So if a contractor has been employed by a board of health to do a particular act, and does it negligently, he may be held liable for the consequences.¹⁰

¹ Meechem on Public Officers, § 594; Holliday v. St. Leonard, 11 Com. B. (N. S.) 192.

² Hall v. Smith, 2 Bing. 156; Harris v. Baker, 4 Maule & S. 27; Sutton v. Clarke, 6 Taunt. 34; Holliday v. St. Leonard, *supra*.
³ Rowe v. Addison, 34 N. H. 306, 312, and cases cited.

⁴ Butter v. Ashworth (Cal.), 36 Pac. Rep. 922.

⁵ Merritt v. McNally (Mont.), 36 Pac. Rep. 44.

⁶ Rauer v. Lowe (Cal.), 107 Cal. 229, 40 Pac. Rep. 337 [1895].

⁷ Shepherd v. Lincoln, 17 Wend. (N. Y.) 250.

⁸ Bennett v. Whitney, 94 N. Y. 302; Rec-tor v. Pierce, 3 Thomp. & C. (N. Y.) 416; and a bridge, People v. Adsit, 2 Hill (N. Y.) 619; cases cited, 19 Amer. & Eng. Ency. Law 495.

⁹ Robinson v. Chamberlain, 34 N. Y. 389.

¹⁰ Arthy v. Coleman, 8 E. & B. 1092 [1857].

255. Public Officers and their Liability upon Contracts Executed for the State.—When a man acting in the capacity of a public officer makes contracts or signs obligations, there is a strong presumption of law that he does not intend to bind himself personally, nor that the contractor looks to him individually to be responsible. The government can act only through its officers and agents, and if they were held personally liable on the obligations they assume for the government, it might be difficult to secure the services of capable and responsible men. Public policy demands that they be exempt from liability.¹

A public officer must disclose the fact that he acts as an officer or agent, for if it be not known to the other party he will find himself bound. What was said of agents under parties, in chapter on Contracts, will hold for public officers.²* Where officers of a public or municipal corporation acting officially enter into a contract under an innocent mistake of law, in which the other contracting party equally participates, with equal opportunities of knowledge, neither party at the time looking to personal liability, the officers are not personally liable; and the same rule applies to the officers of a public body which is not a corporation, such as a school district.³

If a person sign his own name to a note followed with "for the selectmen,"* he will be liable personally upon the obligation.⁴

An English case shows how strong this presumption is with some justices. It was held that a public officer is not responsible on any contract he makes in that capacity, and whenever his contract or agreement is connected with the subject fairly within the scope of his authority, it shall be intended to be made officially and in his public character, unless the contrary appears by an absolute and unqualified agreement to be personally liable. It was so held when a contractor had done extra work to preserve a public work not embraced in his contract, upon the assurance of a railway commissioner having charge of the work, that he would pay him; and afterwards on application to him for pay, he said he would see the engineer in charge and have the amount put in the estimates, to be paid for by the government; it was held that the commissioner was not personally liable, the amount never having been paid. The court was divided, one side holding that in case of contracts with public agents the presumption was that the public faith of the government was relied upon, and that the commissioner in ordering the work acted within the scope of his authority as a railway commissioner and did not incur any personal responsibility; and the other side that the contract was verbal, and it should have been left to a jury as to whether the commissioner personally contracted and agreed to pay for the work.⁵

¹ Meechem on Public Officers, § 803.

² Nichols v. Moody, 22 Barb. (N. Y.)

611.

³ Humphrey v. Jones, 71 Mo. 62 [1879].

⁴ Andover v. Grafton, 7 N. H. 298.

⁵ Sumner v. Chandler, 2 Pugsley & B. (N. B.) 175.

* See Secs. 29-42, 54, 149, and 178-180, *supra*.

As stated under the subject of Law of Contracts, if the work is done under a public statute or by virtue of a public act, and the contractor has equal means of knowledge as to the officer's authority, the officer acting in good faith will not be responsible if he has exceeded his authority. Individuals as well as courts are presumed to know and must ascertain the extent of the authority of public agents.¹

256. Officer or Employee is Responsible for His False Representations.—

If the engineer or architect make false or fraudulent representations in respect to matters or work upon which he is engaged, he will be liable to parties who are misled by such representations, and suffer in consequence thereof whether the engineer be acting in the capacity of a professional engineer² or a public officer.³ It was so held when an architect ordered stones to complete a church the erection of which he was superintending. To get them, he represented or pretended that he was authorized to order the stones, and he was required to pay for them, notwithstanding the fact that they were used in the church edifice. Whether he made the representations with intent to deceive, or knowing he had no authority, or under the *bona fide* belief that he had authority, in any case he was held liable.⁴

257. Engineer's and Architect's Liability when Holding Office of Public Trust.—In the capacity of county surveyors, state or city engineers, city or government architects and commissioners, their relations to their work and to their patrons are different from those of a professional engineer or agent. When acting judicially or exercising discretionary powers, the public officer should be afforded the same protection as any other person, and he is so protected.⁵ Even when his duties are purely ministerial, the requirements of a public officer are not so exacting as are those of a professional man. While the latter is responsible for an ordinary amount of skill and capacity for the work he solicits, the former, being elected or appointed, is not held upon an implied undertaking that he does possess a certain amount of skill and that he will exercise it. If it were required that such officer, elected or appointed, should be competent and that the incumbent should possess the requisite skill, many public offices would "go a begging, and the government service might be seriously crippled." Public policy is said to recommend that they should be exempt.

258. A City Engineer's Liability for Mistakes.—One of the most interesting and instructive cases reported in the books was one of a practical surveyor and city engineer who surveyed a lot for the owner at the latter's request, and made a mistake so that the owner's building was erected 2.2 feet upon his neighbor's lot. It was shown that the defendant was a surveyor and civil engineer, and that by ordinance of the city

¹ 19 Amer. & Eng. Ency. Law 500-501.

² *Randell v. Trimer*, 18 C. B. 786 [1856].

³ *Culver v. Avery*, 7 Wend. (N. Y.) 380; *Newman v. Sylvester*, 42 Ind. 106.

⁴ *Randell v. Trimer*, 18 C. B. 786 [1856].

⁵ *East River Gas Light Co. v. Donnelly*, 25 Hun 614; 19 Amer. & Eng. Ency. Law 484.

the city engineer was required to make surveys of lots within the city limits for private individuals when requested. The ordinance fixed the amount of fees he should receive from persons for whom the survey was made. The surveyor introduced evidence tending to show that he used due care and exercised a reasonable degree of skill in making the survey, and in fixing the boundaries to the lot, and that he believed the survey to be correct at the time it was made.

The case was tried before a jury, and the judge was requested but refused to charge: "That if the jury believed from the evidence that the defendant as city engineer or surveyor used due care and exercised a reasonable amount of skill in locating the boundary line to plaintiff's lot, the latter was not entitled to recover against the defendant surveyor, although the boundary lines were incorrectly established." The jury found for the plaintiff, and the surveyor excepted and moved for a new trial.

In delivering its opinion the higher court said: "An ordinance of the city required the city engineer to survey and mark the boundaries of lots within the city when called upon so to do by private individuals, and prescribed his fees therefor (\$2.50). He had no discretion to refuse when called upon to perform such services, but this did not constitute him an agent of the city for that purpose. Neither the city nor any private person was bound by the surveys he might make when acting at the request of an individual. His report would not be conclusive as to the boundaries of the lot. His certificate could not be given in evidence as settling the boundary. He did not do it for the city. When the corporation makes public improvements and he acts under its direction, then he is its agent, and his act is the act of the city, and if any person is damaged thereby, it, and not he, is liable."¹

Whether he acted as city engineer or as a professional surveyor, he was not bound to the exercise of more than reasonable care and skill. If he did the work in the former capacity, he was liable for negligence or fraud only; if in the latter, then he would not only be liable for negligence or fraud, but for want of skill. In neither capacity does he insure the correctness of his work. The law exacts that of no man. A man exercising the functions of an office must discharge his duties carefully, diligently, and honestly, and if he does so, he will not be liable for damages; but when a man holds himself out to the public as a professional man he engages to do more. He thereby agrees with those who employ him to do the work, not only carefully, diligently, and honestly, but skillfully. Absolute correctness is not to be the test of the amount of skill the law requires. A reasonable amount of skill is all he is bound to bring to the discharge of his duties. Upon the trial of the case, the manner in which the survey was made was a material question, and it was a question to be determined by the jury. They were to deter-

¹ *McCarthy v. Bauer*, 3 Kans. 237 [1865]; *semble Sievers v. San Francisco* (Cal.), 47 Pac. Rep. 687.

mine the amount of care and skill he *did* exercise in performing the work, but the court was to determine what amount would absolve him from liability in case he made a mistake. There having been testimony on both sides as to the manner in which the work was done, it was necessary that the jury be informed of the rule of the law in order to arrive at a correct conclusion.¹

259. Commissioners of Public Works and Their Liability.—Commissioners appointed or employed for a special and single object, in whose employment there is no enduring element, nor designed to be, and whose duties, when completed (although years may be required for their performance), terminate the employment, are not officers in the sense in which that term is used in the constitution of the State of Illinois.² Clerks of commissioners intrusted with the conduct of public works, are not liable in damages for an injury occasioned by the negligence of artificers employed under their authority.³ A public officer has been described as one who occupies an office that is parcel of the administration of the government, civil or military, or is itself created directly by the law-making power. The chief engineer of a *quasi* public corporation, like a railroad company, is not a public officer.⁴

259A. Situation of Engineer or Architect in Injunction and Mandamus Proceedings—Liability for Contempt.—A trying position in which an engineer is sometimes placed, and one in which some knowledge of law will assist him, is where proceedings at law are threatened, or an injunction is sought, when by prompt and decisive action or by shrewd and skillful application of his legal knowledge, he may outwit the prosecutor and accomplish the object which others seek to prevent. A structure once erected, an equity judge will seldom decree its removal or destruction. Structures once erected, or whose definite location, character, and purposes have not been made known, or proposed works which cannot be proved nuisances, because their purpose and character is unknown, are comparatively safe from being enjoined. Under the protection of these and other safeguards the legal engineer is frequently able to defeat opposition to the plans of his employer.⁵ However, the fact that an alleged unlawful structure was completed pending an action to enjoin its construction and maintenance does not affect the right of the court to enjoin its maintenance.⁶

Injunctions sometimes issue that may be evaded on technicalities, the recognition and prompt advantage of which may be taken by an engineer

¹ McCarthy v. Bauer, 3 Kans. 237 [1865]; see also Waller v. Dubuque, 69 Iowa 541; Alcorn v. Philadelphia, 44 Pa. St. 348 [1863]; 2 Dillon's Munic. Corp'ns, § 237 note, 859, 910, 978; Rowe v. Addison, 34 N. H. 306, 312; Norwell v. Wright, 3 Allen (Mass.) 166; Chitty's Contracts [9th Amer. ed.], p. 598; Story's Agency 328.

² Bunn v. The People, 45 Ill. 397 [1867];

The cases of Dickinson v. The People, etc., 17 Ill. 191; and The People v. Ridgley et al., 21 Ill. 65, cited and explained.

³ Hall v. Smith, 2 Bing. 156 [1824].

⁴ Eliason v. Coleman, 86 N. C. 235 [1882].

⁵ 10 Amer. & Eng. Ency. Law 833-7.

⁶ Holmes v. Calhoun County (Iowa), 66 N. W. Rep. 145.

versed in law. If the injunction cannot be defeated or avoided, then it becomes his duty to employ other tactics. Whether he assumes to negotiate, to fight, or to beg, he should know what attitude to take, on what ground to stand, and how to maintain it. These questions and duties may properly belong to other officials of the company to determine, but frequently the engineer is the only representative present upon the works. Large corporations whose works extend over a large territory, whose offices and officers may be many hundred miles from the arena of trouble, cannot decide such difficulties with the clearness and understanding of the engineer. They have to learn from him the whole story, the condition of the work, the injury consequent to delay, and then decide on as little knowledge perhaps as he should possess, if qualified in the principles of engineering jurisprudence.

The subject of injunctions and mandamus is too deep to undertake to present even in the briefest manner, and the reader must be content with a passing notice of the subject. A fair understanding of what precedes, and some collateral reading upon the law of real estate, including adverse possession, easements, prescription, and the law of torts will put an engineer or architect in the possession of knowledge that will certainly greatly assist him in the preservation of his employer's property, and in carrying out his schemes and projects in spite of opposition and competition.

Notice of the injunction or order must be brought to the knowledge of the party enjoined.¹ It does not matter how the information was acquired, if he knows an injunction has issued and what it contains, he must answer for any violation of it as if the writ had been regularly served upon him by an officer of the court.² His knowledge must be positive and something more than hearsay, and some cases hold that there must be a personal service of the order before one can be charged with contempt for not obeying it.³ A copy of an injunction left at a person's residence⁴ is a notice to him, and a service on a company at its office is one to its directors,⁵ and a service on the mayor of a city has been held a notice to all the officers and members of the city government who know about it,⁶ including agents and employees.⁷ If officers of a company conceal themselves to avoid service, a service upon one who acts as their attorney will, it seems, be sufficient.⁸ It has been held that a notice could be sent by telegraph, if it stated clearly and plainly what the party must refrain from doing.⁹

An injunction issued by a court of competent jurisdiction must be fairly and honestly obeyed it cannot be evaded by subterfuges or tricks.¹⁰ If the

¹ 10 Amer. & Eng. Ency. Law 1011.

² McCauley v. Palmer, 40 Hun (N. Y.)

38; Sanford v. Sanford, 40 Hun (N. Y.)

540

³ Morris v. Bradford, 19 Ga. 527.

⁴ Brown v. Pac., etc., R. Co., 5 Blatchf. (U. S.) 525.

⁵ People v. Sturtevant, 9 N. Y. 263.

⁶ Wellesley v. Mornington, 11 Beav. 181.

⁷ Golden Gate Min. Co. v. Yuba Co. Super. Ct., 65 Cal. 187.

⁸ In re Bryant, 4 Ch. D. 98; Cape May, etc., R. Co. v. Johnson, 35 N. J. Eq. 422.

⁹ Welox Silv. P. Co. v. Schimmel 59 Mich. 524.

court has not jurisdiction, then one who disobeys it will not be punished for contempt.¹ If the court has not authority in the sense of being in excess of its powers as limited by the constitution or defined by law, then one is not subject to contempt for disobeying it.² The erection of a bridge under a special act of Congress in disobedience to an injunction was held not a contempt.³ Ignoring an injunction to prevent the infringement of a patent which is declared invalid on appeal has been held not contempt.⁴ If the order of the court is merely erroneous, some courts hold it must be obeyed, or the one who violates it may be punished.⁵

If the law plainly requires a public officer to perform a duty and he is not exceeding or abusing his powers, but is acting fairly within them, he should discharge his duty as prescribed by law, although a court issues a writ restraining him from its performance.⁶

The fact that a party who has disobeyed an order of the court did so under the belief or under advice that the order did not forbid the act, will not excuse him from being punished for contempt.⁷ Advice of counsel that an injunction is void and may be disregarded will not protect one nor justify a disobedience of an order of the court; yet if the person in contempt has not been headstrong and disrespectful to the court, it will be a factor in mitigating the punishment or lessening the damages incurred.⁸ Whether or not a person has committed contempt does not depend upon his intention, but upon the act done. Therefore laboring men, not familiar with legal proceedings, were guilty of a constructive contempt, who did not at once fully obey an injunction served in the absence of their employer, because they thought the writ meant they should appear and answer with the employer, though they desired to respect the order of the court and partly obeyed it.⁹

An interesting case is reported where a company was enjoined, at the suit of a water company, from allowing any deleterious substances to escape from its factory into the river. The company thereupon built a reservoir on the bank of the river, which it negligently and carelessly permitted to break and discharge its contents, it was held a contempt punishable by fine, or by fine and imprisonment, although there was no willful purpose to violate the injunction.¹⁰ A man is not guilty of a constructive contempt

¹ 3 Amer. & Eng. Ency. Law 788.

² Keenan v. People, 58 Ill. App. 241.

³ State of Penna. v. Wheeling Bdge. Co., 13 How. (U. S.) 518, 18 How. (U. S.) 421. *see other cases*, 10 Amer. & Eng. Ency. Law 842-3.

⁴ Worden v. Searls, 121 U. S. 14.

⁵ Keenan v. People, 58 Ill. App. 241; Walton v. Develing, 61 Ill. 201 [1871]; *but see In re McCain* (S. D.), 68 N. W. Rep. 163.

⁶ Walton v. Develing, 61 Ill. 201 [1871];

see People v. Edson, 52 N. Y. Super. Ct. 53, mayor appointing superintendent of public works; *and Bowery Nat. Bk. v. Mayor*, 63 N. Y. 336 [1875].

⁷ Atlantic Powder Co., 9 Fed. Rep. 316.

⁸ 10 Amer. & Eng. Ency. Law 1011-1012.

⁹ Shirk v. Cox (Ind. Sup.), 40 N. E. Rep. 750.

¹⁰ Indianapolis Water Co. v. American Strawboard Co. (C. C.), 75 Fed. Rep. 972.

for disobeying an injunction prohibiting work on a structure when the order was served on a legal holiday, more than twelve miles away from the works, and that next day he drove to it and ordered his men to quit work, as required.¹

A person guilty of contempt has the privilege of purging it. A declaration that no disobedience or disrespect was intended and, that he acted in good faith, usually is sufficient, if he can satisfy the court, under close questioning, of the truth of his declaration and sincerity of his intentions. Some courts hold that the offender cannot be fined or punished without giving him a chance to explain. A mere disavowal of an intentional wrong, without an expression of regret, will not purge it. If the person shows his inability to perform, it may purge the contempt, but not inability to pay a fine.² Public officers who have not obeyed an injunction, and have been convicted of contempt, which conviction stands unreserved, must, it seems, stand the expense of the contempt proceedings. City aldermen cannot make the city liable for such costs.³

¹ *Shirk v. Cox* (Ind. Sup.), 40 N. E. Rep. 750.

² *West v. Utica* (Sup.), 24 N. Y. Supp. 1075.

³ *Amer. & Eng. Ency. Law* 796-799.

CHAPTER XIII.

COMPENSATION OF ENGINEERS AND ARCHITECTS.

PROTECTION OF LIEN AND OTHER LAWS—FREE PASSES.

260. Architect's or Engineer's Compensation.*—In connection with the employment of an engineer or architect the question naturally follows as to his compensation and the means he may have of securing it. His compensation will, of course, be the amount agreed upon in his contract of employment. It is usual to receive a percentage of the cost of the works or structure, varying from 3 per cent. on very large works to 15 per cent. on small jobs. Engineers are frequently employed on an annual salary of from \$1000 to \$10,000, depending upon the reputation of the engineer and the wealth of the corporation. If no price is agreed upon for services, then the employee may recover what his services are reasonably worth, which may be a question for a jury to determine from evidence produced as to what is usually charged for such services, or the amount it is the custom to receive on such works.

Resort to the courts is the proper means of enforcing payment for services, and the action may be of contract, for work, labor, and materials, or on a *quantum valebat*, or on the common counts.†

To entitle an architect to recover for plans which he is employed to make, he must show their delivery, or a tender of them.¹ An architect employed to prepare plans and specifications of a building, and furnish an estimate of the probable cost, is not, upon submitting the same, entitled to his fees unless the building can be erected at a cost reasonably approximating that stated in such estimate.²

261. Rights of Engineers and Architects to a Lien for Services.—Mechanics, laborers, and materialmen have received the special protection of the law in the shape of liens and "stockholders' liability acts" to secure payment for their services and materials. Much litigation has been engaged in to determine whether an engineer and architect were entitled to protection under these acts. The courts have arrived at different decisions, depending frequently upon the judges' own notions of an architect's or engi-

¹ *Wandelt v. Cohen* (Com. Pl.), 36 N. Y. Supp. 811.

² *Feltham v. Sharp* (Ga.), 25 S. E. Rep. 619.

* See Sec. 296, *infra*.

† See Secs. 211-214, *supra*.

neer's duties, and the character of his work, and at other times upon the interpretation and construction of the act. It is impossible to reconcile the cases and to make any general statement of the law that shall cover all cases. It is well established that the acts are not generally intended for the protection of so-called professional men. An act for the protection of employees, operators, and laborers of a company has been held not to include the superintendent and attorneys of the company,¹ nor can an agent, superintendent, general manager, or general manager and bookkeeper be embraced under any of the terms laborer, servant, or apprentice.²

It is usually held that a general enactment for the protection of laborers, mechanics, apprentices, and materialmen will not extend to an architect who simply prepares plans and specifications. The decisions are nearly, if not quite, uniform upon this point, except in those states whose statutes expressly name architects as being within its protection.³ To same effect, a plan of a house, or a model, or a mold, or a piece of work, do not enter into a structure, and cannot be regarded as within a statute giving liens to materialmen and laborers; nor can a lien be had for tools used in the construction of the structure,⁴ nor for labor not bestowed upon the works. Therefore, it was held that a cook, who cooked for workmen, even though the cooking was done upon the grounds as the work progressed, was not entitled to a lien on a water-works reservoir.⁵ A contrary rule was held in Minnesota, where a cook was held entitled to a lien on logs, he having cooked in a camp for men actually and directly engaged in cutting, hauling, and banking logs, and the blacksmith who shod horses, repaired, and sharpened tools for the men was also held entitled to a lien on the logs gotten out.⁶ Other cases hold that to create a lien the materials must be used for erecting, altering, or repairing the structure, and must be so applied as to constitute a part of it.⁷

A mining engineer who has rendered professional services only is not entitled to a lien under the statute of Utah.⁸

262. If Architect or Engineer Supervises and Directs Work He may Have a Lien in Some States.—It is well settled in Pennsylvania, New York, New Jersey, Minnesota, and Illinois that when the architect directs and oversees the erection of a structure in accordance with the plans and specifications, then he does bring himself within the statute, and is entitled to its benefits for so much as the superintending is worth.⁹

¹ *People v. Remington*, 45 Hun 338 [1887].

² *Small House v. Ky. & M. G. Co.*, 2 Mont. 443 [1876]; *Getty v. Ames* (Oreg.), 48 Pac. Rep. 355 [1897]; *People v. Remington*, *supra*, and cases cited; *McDonald v. Charlestown*, etc., R. Co. (Tenn.), 24 S. W. Rep. 252; *Addison v. Pac. Coast Mill Co.* (C. C.), 79 Fed. Rep. 459.

³ *Price v. Kirk*, 90 Pa. St. 47 [1879]; *Foushee v. Grigsley*, 12 Bush 75 [1876].

⁴ *Ames v. Dyer*, 41 Me. 307 [1856];

semble, *Sweet & Carpenter v. James*, 2 R. I. 270, 288; *Phillips v. Wright*, 5 Sandf. 342.

⁵ *McCormick v. Los Angeles Co.*, 40 Cal. 185.

⁶ *Breault v. Archambault* (Minn.), 67 N. W. Rep. 348.

⁷ *Lambard v. Pike*, 33 Me. 141.

⁸ *Mining Co. v. Cullins*, 104 U. S. 177.

⁹ *Bank v. Gries*, 35 Pa. St. 423; *Railroad Co. v. Lenfner*, 84 Pa. St. 163; *Hubert v. Aitken*, 15 Daly (N. Y.) 237; *Stryker v.*

It is submitted that this is no more than just, that even though a person be denominated an architect in the contract, if he performs the duties of a mechanic, foreman, inspector, or superintendent, he should be entitled to a lien the same as any other employee of the same class. If his duties require him not only to draw plans, but to explain, direct, and lay out the work, then he is performing functions that ordinarily belong to a master mechanic or boss carpenter. It is as essential to the proper construction of a building as is the purely mechanical part; it is simply of a higher order, and the fact that it requires some architectural skill should not impair his right to a lien.¹

It may be noted, however, that the architect recovers as a mechanic and for mechanical work, and not for general professional duties as an architect. The architect cannot claim a lien for charges and fees alone; he must show work done, and the kind of work should be set forth distinctly. A mere naked architect who draws plans in anticipation of building, without being an operative mechanic, is not within an act that provides a lien for work "done for and about the erection of a building."² One who has for more than five years been a student of architecture and building construction, and has planned, worked on, and superintended the construction of buildings of different kinds, inspecting the work of construction in all its branches, has been held a "practical building mechanic," within a city charter prescribing the qualifications of inspectors of buildings.³

A similar rule was adopted with reference to a civil engineer, which was reversed by the same court that decided the Pennsylvania case, though at an earlier date. It was held that laborers and workmen were synonyms; that an engineer employed on construction was a workman; that his work was physical as well as mental. He makes diagrams and plans, ascertains and marks the lines, directs and superintends the work. The court further expressed the opinion that the engineer's labor was skilled work, and so was that of the bridge-builder, and whether he was the master who simply directed or the man who used the tools, that it could not be doubted that he was within the statute; that the object of the legislature was to give those whose skill and labor created the structure a special hold upon it for compensation.⁴

This decision was reversed and quite a contrary opinion rendered. The court said: "The words laborer or workman used in the act cannot ordinarily be understood to embrace persons engaged in a learned profession,

Cassidy, 76 N. Y. 50; *Rim v. Electric P. Co.* (Sup.), 38 N. Y. Supp. 345; *Mutual Benefit L. Ins. Co. v. Rowand*, 26 N. J. Law 389; *Knight v. Norris*, 13 Minn. 473; *Phillips on Mechanics' Liens* (2d ed.), § 158; and see 1 Oreg. 169; 11 Nev. 304; and other cases cited. *infra*.

¹ *Bank v. Gries*, 35 Pa. St. 423 (11 Casey) [1860].

² *Price v. Kirk*, 90 Pa. St. 47 [1879]; *Rush v. Able*, 90 Pa. St. 153; *Railroad Co. v. Leufner*, 84 Pa. St. 168.

³ *People v. Board of Aldermen of Buffalo* (Sup.), 42 N. Y. Supp. 545.

⁴ *Leufner v. Pa. & Del. Ry.*, 11 Phila. (Pa.) 548 [1876]; accord, *Stryker v. Cassidy*, 76 N. Y. 50; *semble*, *Conant v. Van Schaick*, 24 Barb. 99.

but rather such as gain their livelihood by manual toil. When we speak of the working classes we certainly do not intend to include therein persons like civil engineers, the value of whose services rests rather in their scientific than their physical ability. We thereby intend those who are engaged, not in head, but in hand work, who depend upon such hand work for their living. In all the statutes of this kind the intent has been to protect a class of persons who are wholly dependent upon their manual toil for existence and who cannot protect themselves. It is true in one sense the engineer is a laborer, but so is the lawyer and doctor, the banker, and corporation officer, yet no statistician has ever been known to include them among the laboring classes. We cannot, therefore, even to save a meritorious claim, undertake to make a new classification which must necessarily defeat the statutory intent."¹ In line with the same argument it has been held that a professional chemist, employed to analyze metals, is not entitled to a preference under a statute giving preferences to laborers, even though the work could have been done by a laborer.²

These two decisions seem to have been made largely upon the personal (individual) ideas of the judges who rendered them. It is difficult to see how an engineer can better protect himself than a materialman or a laborer. And the appellate judge's knowledge of the duties of an assistant engineer on location of a railroad must have been very limited when he compares the manual labor of an engineer in the field with that of a lawyer, doctor, banker, and corporation officer. This case was an earlier decision than the one allowing an architect a lien for his services superintending, and, as all are Pennsylvania cases, it can hardly be said that the law is settled. It is impossible to distinguish between an architect superintending a house and an engineer in charge of construction of a bridge or other structure. The duties of both are the same. Both are required to explain the plans and drawings, to give lines and levels, lay out work, and give it general superintendence. It is, therefore, contended that if the engineer had only included in his claim for a lien his charges for superintendence and active field duties on the line, he should have been given the benefits of the statute.

This belief is further strengthened by two recent cases—one where an architect had been engaged to prepare the plans and superintend the erection of a building, which was abandoned when only partially completed, and the court held that the architect could not be allowed a lien upon the unconstructed part of the building, for it was the architect's services rendered during the construction of the building which brought him within the lien law;³ and another case under a statute providing that when any person

¹ Penna. & Del. R. R. Co. v. Leufner, 84 Pa. St. 168 [1877]; Wentroth's Appeal, 1 Norris 469.

² Cullum v. Lickdale Iron Co. (Com. Pl.),

5 Pa. Dist. Rep. 622.

³ Judge Cullen in *Rfm v. Electric Power Co. of S. I.* (Sup.), 38 N. Y. Supp. 345 [1894], 3 App. Div. (N. Y.) 305 [1896].

shall intrust to any mechanic, artisan, or tradesman materials to construct, alter, or repair any article of value, or any article of value to be altered or repaired, the mechanic, artisan, or tradesman shall have a lien on such articles, it was held that a civil engineer who makes field notes, maps, charts, and drawings for a corporation, while employed by it, on books and papers furnished by it for that purpose, is entitled to a lien thereon and the possession thereof until paid for his services.¹

It is impossible to say with any certainty what the law is in any state, for the mechanic lien laws are subject to frequent changes; and the right to a mechanic's lien being purely statutory, the value of a decision is lessened by every change. In Illinois and New York an architect or engineer has been held entitled to a lien for superintending;² and an architect has been held entitled to the protection of the lien laws in Alabama,³ for "work or labor upon a building or improvement on land;" in Ohio⁴ and in Iowa for plans, specifications, and superintendence;⁵ in New Jersey for plans and specifications and superintendence at 2½ per cent;⁶ in Minnesota at 5 per cent;⁷ also in California;⁸ in Louisiana;⁹ and in Canada.¹⁰

Maine, Missouri, Kentucky, and Tennessee have refused to recognize the right of architects to a lien under a law passed to protect mechanics and workmen, even though they do superintend the erection of the building.¹¹

If the contract provide that all payments shall be made on certificates of the architects, who were employed to supervise the construction at 5 per cent. of its cost, and that final settlement should be made on their certificate, it was held that, as the last act required of the architect was to give a final certificate, his time for filing a lien for services did not begin to run until the performance of such act.¹²

The argument that by the constitution "all men are born free and independent, and have certain indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness," does not seem to have had much weight in an attack against lien laws which protect only a certain class of employees.¹³

¹ Amazon Irrigating Co. v. Briesen (Kans. App.), 41 Pac. Rep. 1116.

² Taylor v. Gilsdorf, 74 Ill. 359; Rim v. Electric P. Co., 3 App. Div. (N. Y.) 305 [1896]; Stryker v. Cassidy, 76 N. Y. 50; Gurney v. Atlantic, etc., R. Co., 58 N. Y. 358; Hubert v. Aitken, 15 Daly 237; but see Ericsson v. Brown, 38 Barb. 891.

³ Hughes v. Forgeson, 96 Ala. 346.

⁴ Phoenix Fur. Co. v. Hotel Co. (C. C.), 66 Fed. Rep. 683.

⁵ Parsons v. Brown (Iowa), 66 N. W. Rep. 880.

⁶ Mutual v. Rowand, 26 N. J. Eq. 389.

⁷ Knight v. Norris, 13 Minn. 473; and see Waaganstein v. Jones (Minn.), 63 N.

W. Rep. 717; Gardner v. Leck (Minn.), 54 N. W. Rep. 746.

⁸ Pac. Mut. Life Ins. Co. v. Fisher (Cal.), 42 Pac. Rep. 154.

⁹ Mulligan v. Mulligan, 18 La. Ann. 20.

¹⁰ Arnoldi v. Gourin, 22 Grant's Ch. (Ont.) 314.

¹¹ Ames v. Dyer, 41 Me. 397; Raeder v. Bensberg, 6 Mo. App. 445; Foushee v. Grigsby, 12 Bush 76; Thompson v. Baxter (Tenn.), 21 S. W. Rep. 668; and see Adler v. World's P. Exp. Co. (Ill.), 18 N. E. Rep. 809 [1888].

¹² Bentley v. Adams (Wis.), 66 N. W. Rep. 505.

¹³ Hoffa v. Person, 1 Pa. Super. Ct. 357.

263. Engineers' or Architects' Rights under the Stockholders' Liability Acts.—The law is in about the same condition with regard to the constitutional and statutory provisions making stockholders liable for the labor debts of the corporation. There are many cases that hold that an engineer is not a laborer within the meaning of these acts,¹ while others have maintained a contrary view.²

It is believed that the cases may generally be distinguished in the same way as under the lien acts. It is certain that to bring one's self within the meaning of the statute they must strictly answer the description employed. If the statute provides for the protection of the laborers and operatives of a company or their laborers, servants, and apprentices, the engineer must come well within the meaning of one of the classes mentioned. It was therefore held that a consulting engineer was not within the meaning of the act, the court adding that it was the policy of the legislature to protect those only who are the least able to protect themselves, and who earn their living by manual labor for a small compensation, and not by professional services.³ This, it is submitted, is peculiar law, which determines the rights of a citizen by the question whether he lives from hand to mouth or whether he has a competence; and this it is believed cannot be made the test. The test should be whether the employee literally brings himself within the statute.

A consulting engineer,⁴ a contractor,⁵ and officers of the company, as the chief engineer and the assistant chief engineer;⁶ persons who have a proper and distinctive appellation, such as officers and agents of the company, are not in the general acceptance of the term servants; but an engineer who is employed in the ordinary field operations of surveying, who is subject to the directions and control of the officers and sometimes the servants of the company, is a servant in its strictest or most ordinary sense. It was therefore held when a civil engineer sought to recover from a shareholder of a bankrupt company, for services of himself and a rodman in his employ, that he could recover. The judge said, "I can see no middle ground between restricting the statute to day-laborers and applying it to all persons employed in the service of the company who have not a different and distinctive appellation, such as officers and agents. The engineer, the master mechanic, the conductor, is as fully entitled to its benefits as the man who shovels gravel. The latter is no more nor less a servant of the company than either of the former."⁷

Ten years later it was decided that a person employed by a manufacturing corporation as its civil engineer and traveling agent at a fixed salary was

¹ *Brockway v. Innes*, 39 Mich. 47 [1880]; *Boutwell v. Townsend*, 37 Barb. 205; *Hovey v. Ten Broeck*, 3 Roberts 316; *Coffin v. Reynolds*, 37 N. Y. 640; *Aiken v. Wasson*, 24 N. Y. 482; *Fish v. Dodge*, 38 Barb. 168; 17 Amer. L. Reg. 102.

² *Conant v. Van Schaick*, 24 Barb. 87; *Richardson v. Abendroth*, 43 Barb. 162;

Williamson v. Wadsworth, 49 Barb. 296; *Bailey v. Banker*, 3 Hill 188.

³ *Ericsson v. Brown*, 38 Barb. 390.

⁴ *Aiken v. Wasson*, 24 N. Y. 482.

⁵ *Brockway v. Innes*, 39 Mich. 47 [1880].

⁶ *Conant v. Van Schaick*, 24 Barb. 87 [1857]; see *Bailey v. Banker*, 3 Hill 188.

a servant of the corporation within the meaning of the act. This case was determined upon the legal meaning of the word servant used in the act as distinguished from an independent contractor or an officer. A servant in law is one who acts in subordination to others, under whose orders, directions, and control he acts for the time being. The one commands, the other obeys; the one is proprietor and superior, the other a mere helper. The party here was employed as engineer and traveling agent at a fixed salary, he was in every act relating to his employment in subjection to the company, bound as to the time and manner of performing his duties, to follow their directions and implicitly obey their commands. He was, in this capacity, their subordinate helper, and therefore a servant within the act.¹ On this line of reasoning it must follow that a contractor for construction of a structure would not be entitled to the protection of the statute, and the cases are to that effect.²

This latter view would seem to be sound law, and the only test that avoids complications and difficult discriminations. In conclusion, it may be said that a general statement that an architect or engineer is or is not entitled to a lien or to an action for services under the stockholders' liability act, have been such as will bring him within the act, and not by what name or cannot be made. It must depend in each case on whether the duties of the claimant title he has been designated.

264. Compensation for Injuries Received while Riding on a Free Pass.—Engineers and architects in the employ of railroad companies or of companies having intimate business relations with the railroads often travel free of charge, or, in the popular phraseology, "upon a pass." These passes usually have printed upon them a stipulation or reservation similar to the following: "The person or persons using this pass hereby voluntarily assumes all risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether by negligence of their agents or otherwise, and that in the use of this ticket he will not consider the company as a common carrier or liable to him as such." As explained under the subject of Contracts, such an agreement is against public policy and void when it requires the person accepting and using the free pass to release the carrier from injury to his person or property by reason of the negligence or willful wrongdoing of its employees.³ Nor can such a stipulation be made a condition in the engineer's contract of employment.⁴ In spite of such releases, therefore, it has been held frequently that the party riding upon such pass could recover.⁵

¹ *Williamson v. Wadsworth*, 49 Barb. 294 [1867]; *Richardson v. Abendroth*, 43 Barb. 162.

² *Aiken v. Wasson*, 24 N. Y. 482 [1862]; *Peck v. Miller*, 39 Mich. 594 [1880].

³ 9 Amer. & Eng. Ency. Law 913, 914.

⁴ *Accord*, *Lake Shore, etc., R. Co. v. Spangler*, 44 Ohio St. 471 [1887]; *Roesuer v. Herman*, 3 Fed. Rep. 782; *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169; 2 *Thomp. on Negce.* 1025; 1 *Cent. L. J.* 485.

⁵ *Porter v. N. Y. L. Erie & W. R. Co.*,

* See Chap. I, Sec. 86, *supra*.

There are many decisions to the contrary, which maintain that an agreement to assume the risk of injuries to one's person from negligence of the company's servants, is valid if it is made *in consideration of the free carriage,*¹ or of employment,² and that if a passenger receives a free pass or ticket with an indorsement of such a contract upon it he will be bound by its terms.³

The fact that when injured he was riding in a parlor or sleeping car, on a ticket entitling him to that privilege and for which he paid cash, will not change the relation between him and the railroad company, nor make him a passenger for hire.⁴

265. Passes are Usually Given for Some Consideration.—The point is that passes are not, at the present day, granted gratuitously to people. When given to employees they are part of the consideration of employment, and an important one to an engineer, whose duties call him to all points of the road. If he were not provided with free transportation his salary or compensation would have to be increased materially. The same view has been taken of a cattleman riding upon a drover's pass, he being regarded as a paying passenger.⁵ The same might be held of many others who ride upon free passes which are indorsed with cast-iron [glass] stipulations calculated to avoid all and every liability for injuries from whatever cause; such as attorneys, granted in part consideration of services; editors and other attachés of newspapers, in consideration of advertising and good will; emigrants and cattlemen, in consideration of getting their shipments; and, perhaps, even office-holders and politicians, in consideration of their looking after the interests of the carrier in Congress and the legislature—lobbying, log-rolling, and their general good will.

The giving of the pass alone is pretty good evidence that it was for a consideration. If otherwise, it is a breach of duty on the part of the officers of the company to so use property intrusted to their care as to cause loss to its stockholders. Gratuitous donation of a thing of value for nothing whatever in return, is not prudent management, to say the least.

266. Free Carriage, without any Agreement—Waiving Damages for Gross Negligence.—It is perfectly well settled that the mere fact that

59 Hun 177 [1891]; 9 Amer. & Eng. Ency. Law 914; Griffiths v. Dudley, 9 Q. B.D. 357; Louisville E. & St. L. Ry. v. Donnegan, 12 N. E. Rep. 153; and see 35 Alb. L. J. 404, 33 N. W. Rep. 603, 8 Fed. Rep. 782.

¹ Kinney v. Cent. R. R. of N. J., 34 N. J. Law 513; Perkins v. N. Y. Cent. R. Co., 24 N. Y. 196; Bissell v. N. Y. Cent. R. Co., 25 N. Y. 448; and see Jacobus v. St. Paul R. Co., 20 Minn. 110.

² Pittsburgh, etc., R. Co. v. Mahony (Ind. Sup.), 46 N. E. Rep. 917, but not so if the pass is not a gratuity; Doyle v. Fitchburg R. Co. (Mass.), 44 N. E. Rep. 611.

³ Kinney v. Cent. R. R. of N. J., 34 N.

J. Law 513; Welles v. New York Cent. R. R., 26 Barb. 641; and see The Indiana Cent. R. R. v. Mundy, 2 Ind. 48; Illinois Cent. R. R. v. Read, 37 Ill. 484; see also 9 Amer. & Eng. Ency. Law 913-914, and cases collected; Steamboat v. King, 16 How. (U. S.) 469; 1 Am. R. Cas. 191, note; and an article in 26 Am. Law Review 212 [1892].

⁴ Ulrich v. N. Y. Cent. R. Co., 108 N. Y. 80 [1888].

⁵ Penna. R. Co. v. Henderson, 51 Pa. St. 315; contra, Omaha & R. V. Ry. Co. v. Crow (Neb.), 66 N. W. Rep. 21; other cases 9 Amer. & Eng. Ency. Law 914.

the passenger is carried gratuitously, or as a matter of courtesy, does not prevent him from recovering from the carrier for injuries received arising from gross negligence of the company's servants.¹ In the absence of express agreement exempting the carrier from liability, it will be liable for injuries resulting either from culpable negligence or want of skill; and the liability does not arise from any implied contract, but from the violation of a duty imposed by the circumstances.² A duty is imposed by law that anybody that causes damage to another is bound to repair it, and it is against the policy of the law to allow any one to escape that responsibility.³

An engineer does not, it seems, assume the risks of riding over a defective track, to and from his work, so as to relieve the company from liability for the negligence of its employees.⁴ A person riding on a construction train on account of a pass issued by a subcontractor, over a section of a railroad in possession and under control of the contractor who is injured through the negligence of a locomotive engineman employed and controlled by the contractor, cannot recover from the railroad company whose road they are building.⁵

The constitution of the State of New York, Art. 13, § 5, provides that any public officer elected or appointed to a public office who shall travel on a free pass shall forfeit his office. A notary public has been held a public officer within the article; and it would, without doubt, apply to engineers and architects appointed or elected.⁶ The article applies to public officers using passes received by them before such provision took effect.⁶

¹ Phila. & Reading R. Co. v. Derby, 1 Am. Law Reg. 397 [1852]; other cases cited, 9 Amer. & Eng. Ency. Law 914.

² *Nolton v. Western R. Corp.*, 15 N. Y. 444 [1857].

³ 9 Amer. & Eng. Ency. Law 913.

⁴ *Melvy v. Chicago & N. W. Ry. Co.*

Ia.), 42 N. W. Rep. 563; see also *Northern Pac. R. Co. v. Beaton* (C. C. A.), 64 Fed. Rep. 563.

⁵ *Scarborough v. Alabama Mid. Ry. Co.* (Ala.), 10 So. Rep. 316.

⁶ *People v. Rathbone* (N. Y. App.), 40 N. E. Rep. 395.

CHAPTER XIV.

EMPLOYMENT OF AN ENGINEER OR ARCHITECT AS AN EXPERT WITNESS.

THE CONSULTATION, PREPARATION, AND BEHAVIOR IN COURT. REMUNERATION FOR HIS SERVICES.

267. Expert Witness—Treatment of the Subject.—The duties of an engineer in the capacity of an expert witness may be properly treated under four heads, to wit: (1) Consultation, which may include inquiries to make, information to seek, attitude to assume, and opinion to express; (2) preparation, including study of books, collection of materials, preparation of documents, diagrams, models, and calculations; (3) behavior in court, experts' conduct, duties, and rights upon the witness stand, and what devices he may resort to, to strengthen them and prove his convictions; (4) compensation, whether entitled to anything but regular witness fees.

THE CONSULTATION.

✓ **268. An Expert should Take Time to Investigate and Decide before Giving an Opinion.**—When an engineer is approached by a party to a suit, to ascertain if certain facts are true or if certain results would naturally or necessarily follow certain conditions and circumstances, it is necessary that he should exercise the utmost caution and discretion in giving an opinion. Nothing could be more futile or impossible than to give an opinion without knowing all the facts and circumstances, and until time has been taken for consideration, computations, study, and reflection. An expert's first duty is to thoroughly acquaint himself with the whole story; he must learn all the facts and circumstances, visit the scene of controversy before he can attempt a conclusion. He should deny hasty answers and opinions, but reserve his decisions upon all important questions, and in the sober atmosphere of his study or office, secure from excitement and the coloring of partisan spirit, with his books for counsel and his computations for guides, determine questions upon which he may be asked to stake his reputation and professional experience and controvert the opinions of brother engineers. An engineer is as much justified in requesting time for the consideration of a problem in engineering as is a lawyer to look up a question of law, and unless he is perfectly satisfied (of

the proper solution or of the reasonable outcome of a certain state of facts) that his answer is technically correct, he may simply ask time to consider it further before expressing an opinion or making a decision. Nothing can be more embarrassing than to have to modify or correct opinions hastily given, or more humiliating than to take the fire of a skillful attorney assisted by a learned engineer, in an effort to sustain an untrue statement or a mistake in a professional opinion.

He "stands with bare breast, his entire moral and professional career from childhood open to the shafts of the enemy. If he be proved—and sometimes, if he be accused of being—untruthful, ignorant, incompetent, over-pretentious, careless, or any one of a dozen undesirable things, over goes not only his present case, but his entire future as an unblemished and unvanquished expert."¹ "He stands, as did the gladiator, an Ishmaelite, his hand against every man, and every man's hand against him."² His opponents elevate themselves out of his shattered reputation, and glorify themselves out of the destruction of his fame. Such a mistake is worse than a blunder in actual work, for court proceedings are public property, published by individuals and the press. Though perhaps only a hasty, imprudent reply or remark, it becomes an advertised publication to his discredit, that is always on record, to come up before him at any time and every place, a bitter reminder of his carelessness.

269. Expert must have Regard for the Understanding and Knowledge of His Audience.—"Skilled witnesses are apt to make themselves appear less trustworthy by forgetting that their science has advanced them beyond the ideas of the people before whom they appear. Mr. Brunell, the eminent engineer, being asked once in cross examination, before a committee, how fast steam-carriages might be expected to travel on railroads, answered, 'Very possibly ten miles an hour,' upon which the learned counsel contemptuously bid him stand down, for he should ask him no more questions, and the weight of his former evidence was much impaired."³

The knowledge, observation, and experience of men vary in every imaginable degree; their notions of possibility and probability naturally differ to nearly the same extent. Facts that one man considers both possible and probable, another holds to be physically impossible. These notions are more or less accurate according to one's acquaintance with the laws of nature, of science and mathematics, for phenomena in apparent violation of nature's laws have been found on examination to be the regular consequences of other laws previously known. "The story of the king of Siam is often quoted to show this. This king believed everything the Dutch ambassador told him about Europe, until he mentioned that the water there in winter became so hard that men, horses, and even elephants could walk upon it, which that monarch at once pronounced a palpable falsehood."⁴ The world,

¹ Amer. Engineer, Sept. 12, 1884.

² Engineering News, April 9, 1887.

³ Gressley's Equity Evidence, 469.

⁴ Locke Bk. 4 Ch. 14, § 5.

and especially the ecclesiastical and legal elements of the world, have always been ready to demonstrate the physical impossibility of new ideas and undertakings. Columbus's theory of the shape of the earth, ocean travel by steam, electric telegraphing, high-speed travel in railway-carriages, and a thousand other new ideas and undertakings have been, each in its turn, pronounced impossible, and their probability a lie too gross to require confutation. Their promoters and believers have been the mockery of the world, "consigned to confinement as hopeless lunatics or sent to the stake as emissaries of the powers of darkness."

The skilled witness must confine himself to the understanding of his audience. His language, illustrations, and explanations should be commonplace and within the comprehension of the court and jury. In no instance should good common sense and experience be sacrificed to theoretical and technical views, unless opposed to the truth and to the witness's firmest convictions. He should go into court well armed and fortified with scientific facts and principle, his foundation should be based upon mathematical and scientific reasoning, and not upon popular notions and beliefs; but these facts and principles must be presented and delivered in a manner to be understood. However firm the convictions of an engineer may be within himself, they cannot have much weight as expert testimony unless they can be presented and are comprehensible to the average man; and this must be considered before engaging to prove these convictions in the capacity of an expert witness.¹

270. Esteem in which Experts are Held by Bench and Bar.—An engineer should be made acquainted with the feelings with which he is regarded and the attitude assumed by the court toward him before he consents to appear before it, for or against a cause. He may then see the necessity of considering how clearly and positively he stands upon the question submitted, and how willing he may be to stake his professional standing and reputation upon it.

Courts have little confidence in expert testimony. The opinion of scientific witnesses is at the very bottom of the scale of importance of all the various classes and kinds of testimony. The following, from one of the best text-writers upon the subject of evidence, is but a fair example of the opinions of jurists frequently expressed. He says: "Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These gentlemen are usually required to speak not to facts, but to opinions, and when this is the case it is often quite surprising to see with what facility and to what an extent their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, willfully misrepresent what they think, but their judgments become so

¹ For an interesting case in point, see *Salvin v. N. Brancepeth Coal Co.*, L. R. 9 Ch. App. 705 [1874].

warped by regarding the subject in one point of view, that even when conscientiously disposed they are incapable of expressing a candid opinion. Being zealous partisans, their belief becomes synonymous with Faith as defined by the Apostles, and it too often is but 'the substance of things hoped for, the evidence of things not seen.' To adopt the language of Lord Campbell, 'Skilled witnesses come with such bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence.'"¹

Although this strong language is not always indorsed, and expert evidence is often regarded as absolutely essential in the administration of justice, yet it is discouraged, and received only in cases of necessity, the universal feeling being that better results will generally be reached by taking the impartial, unbiased judgment of twelve jurors of common-sense and common experience than can be obtained by taking the opinions of experts, if not hired, at least friendly, and whose opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted.²

Expert testimony based upon the testimony of a witness which is rejected by the jury is held of no value, and scientific opinions are regarded as worthless when pitted against facts. The theories of skilled men are not always reasonable, and are never to be regarded when they manifestly conflict with established facts.³ However, it has been held error to authorize the jury to reject as untrue the statement of an expert merely because it is not confirmed by their own experience and observation.⁴

271. Biased and Warped Judgments are not Confined to Professors of Science.—However much is said, or may be said, of the differences of opinion among scientific witnesses and of their warped judgments, it may not be out of place to remind lawyers and jurists that no such diversity of opinion exists in science as is openly exhibited in law, both at the bar and on the bench. Mistakes are no more frequent among engineers, chemists, and physicians than they are in the legal profession. Questions of law are frequently as much matters of opinion as are questions of science, and it is submitted that there is no better evidence of the fallibility of human nature than that recorded in the reports of the courts. Every case that is reversed by a higher court is a record of a mistake in the court below, and every suit brought and defended must prove one of three things, viz.: (1) Either, one of the lawyers has misunderstood the facts of his case, or (2) he has lacked in ability and learning of his profession, or (3) (and with all due respect to the legal profession, and with a full appreciation of the tendencies and temptations, and with as much charity as the bench and bar have shown to men of science) he has possessed too much of "that

¹ Taylor's Law of Evidence (8th ed.) 79 and 573.

² Ferguson v. Hubbell, 97 N. Y. 507.

³ Stone v. C. & M. R. Co. (Mich.), 13

N. E. Rep. 686 [1887-8].

⁴ Louisville & N. R. Co. v. Malone (Ala.), 20 So. Rep. 33.

facility of changing his views to correspond with the wishes and interests of his client, and his judgment has become so warped by regarding the case from one point of view"—the professional point, and not the point of law. Any one of these may apply to a skilled witness, but science and engineering are not based upon fictitious rules and principles, such as "every man is supposed to know the law," and "ignorance of the law is no excuse." If judges and lawyers make frequent mistakes, they should have some charity for scientists, whose field is immeasurably broader and infinitely deeper.

The courts and lawyers talk of bias, prejudice, ignorance, and narrow-mindedness of scientific men, but this is manifestly unjust. It is not evident that scientific men make many mistakes in their professional practice. These same lawyers and jurists do not hesitate to consult and employ physicians, chemists, and engineers when they are sick, poisoned, or have structures to erect.

272. Experts Are Champions of Their Clients as Well as Attorneys.—Experts have come to regard themselves as champions of a cause, "and their testimony is nothing more than a studied argument in favor of the side for which they have been called. So generally true is this that it would excite scarcely less surprise to find an expert called by one side testifying in favor of the other side, than to find the counsel upon either side arguing against their clients in favor of their antagonists."¹ In general this cannot be denied, and so long as experts are hired advocates they can be no more blamed for their partisan views expressed than can the counsel for his arguments against his convictions and better understanding; but to make a wholesale declaration that men of science, as a class, are wholly unreliable, that their opinions are biased, bought, and of no weight, is a libel upon several large professions of honorable men, who in their whole lifetimes may not see a witness-stand.

Courts lay it down as a duty to experts, in any case, to testify with impartiality, to give their honest, conscientious opinion and judgment; but as well might they charge the counsels to adhere strictly to their convictions of what the truth is or what the laws are. The opinions of an expert have become an expression which is a part of the counsel's case, and are to support the framework of his arguments. They are prompted by the solicitations and suggestions of the counsel, who is the loudest in berating and condemning the practices which he has created, an example of which is shown in the following libelous comparison, sometimes indulged in by disappointed members of the bar: as "positive, liar; comparative, thundering liar; superlative, scientific witness."²

273. Candid Opinions of Experts may be Had if They are Sought.—If courts want truths and candid opinions, let them acquire the power to summon skilled witnesses of acknowledged authority, on behalf of the court or

¹ 1 Redfield on Wills 103.

² 34 Alb. Law Journal 457.

tate. Let them seek the unbiased and free opinion of engineers and architects, and there will not be the controversy now experienced. Their compensation may be added to the costs of the suit, or be paid from the public treasury. Similar practices are in vogue in France and Germany, and must eventually be adopted in this country.¹

It is submitted that men who care to maintain their name and reputation will hardly care to submit to the reflections, opinions, and directions of an attorney at law upon an engineering question, and it is quite clear that the best men of science, or of the scientific professions, will not act as experts under existing conditions and be subject to any dictation. "Who indeed is oftenest heard from as an expert in court? Not the man of lasting renown and of chief honor in his profession, but rather he of 'your modern kind of fame, the morning papers reeking with his name.'"²

274. It Is the Duty of Every Citizen to Promote Justice.—Where an engineer has given due consideration to his subject, and is perfectly satisfied he can assist justice and can prove the truth to court and jury, he should not refuse. It should be his duty to meet and overcome this reckless and biased practice of warping science to the uses of the wicked. Nature should blush at the uses made of her teachings. Is science a marketable commodity? can mathematics be employed to usurp the truth?³ can the laws of nature be altered to suit the exigency of any and every case? But give an engineer his freedom upon the witness stand, relieve him from the constant interruption and objections of opposing and friendly counsel, permit him to answer questions with proper explanations and limitations, and matters of science and mathematics will not remain long in doubt. Nothing is more annoying and aggravating to a conscientious witness than to be required to answer questions categorically, by *yes* or *no*—questions that have been studied and prepared by the attorney for the express purpose of demonstrating certain doubtful matters of science, or to prove true an untruth, and which may convey an impression directly contrary to the meaning which the witness would express.

From what has been said, the reader may conclude that the writer would warn engineers of parties to suits or their counsel who require certain facts to be established, or who introduce themselves with the question, "Can you or will you testify to this or that fact?" A much better impression may be had of those who inquire after the truth or actual results of certain conditions. The engineer's mission and his profession is simply the elucidation of truth.⁴ If he is a man true to his profession, he will always give the results of his study, whether it bears for or against the side upon which he happens to be called. If he is not prepared to do that, or if the circumstances of the case prevent it, then he is in duty bound to decline, or

¹ Best on Ev'dce (Chamb. ed.) § 515

² 17 Engineering News 234 [1887]; Rogers' Expert Testimony 56.

³ Article in 3 Law Times 444 [1844].

⁴ Wm. J. McAlpine, Transactions of Amer. Soc. C. E. 1870.

refuse to render his services. This he may not always do; but if compelled to attend against his wishes, he cannot be said to be under any obligations to either party to the suit, and may exercise his honest judgment, without prejudice or criticism.

275. The Preparation—Expert Witness should not Only be Informed, but He must be Prepared to Convince Others.—Having consented to appear, and to testify to certain opinions, beliefs, or truths, it now becomes the office of the expert engineer to maintain his position, and to prove his conclusions beyond question. To accomplish this object he should spare no efforts. He must not only be fully informed himself of all the facts, circumstances, and agencies which have brought about the results claimed, but he must be prepared to intelligently present them to the court and jury; to show them the relative positions of objects that figure in the case, their purpose, condition, and effect. To what extent he should carry these preparations, and how far he may utilize them, will now be considered.

276. Use of Books by Expert Witness.—Books of science cannot in general be utilized in court as evidence to prove the declarations and opinions which they contain.¹ The reason for this rule is that the writer was not under oath when he wrote the opinions, and it may be that new circumstances have arisen, and new discoveries since come to light, under which his beliefs would be changed. Furthermore, the author is not in court, he cannot be cross-questioned, the jury have not the opportunity to observe the effect of questioning, or to judge of the character and disposition of the writer.

The force of these reasons does not exist when an expert adopts or ratifies the contents of a book, and offers the opinions of the author as his own. He is then presumed to have considered and weighed the assertions of the book, and to have reached a conclusion of his own, which he is giving in a court of justice, and under the solemnities of an oath. Experts are not, therefore, confined wholly to their personal knowledge and experience, but may give their opinion formed in part from reading of books. They may give the source of their opinions, and state that all writers, so far as they know, support the same opinion.² They cannot, however, be compelled to name the particular books, even when they state that their opinions are based upon standard works.³ It has been held that an expert cannot read from his own published works to support his testimony, especially when the witness does not testify as to the truth of the extracts read.⁴

Testimony as to matters gained from the study of standard works, rather

¹ *State v. Baldwin* (Kan.), 12 Pac. Rep. 318; 7 Amer. & Eng. Ency. Law 513; *Johnston v. Richmond & D. R. Co.* (Ga.), 22 S. E. Rep. 694.

² *State v. Baldwin* (Kans.), 12 Pac. Rep. 318 [1887].

³ *Taylor on Evidence; People v. Vanderhoof* (Mich.), 39 N. W. Rep. 28 [1888]; *Marshall v. Brown* (Mich.), 15 The Repr. 693 [1883]; 32 Alb. Law Jour. 54.

⁴ *Mix v. Staples*, 17 N. Y. Supp. 775, Justice O'Brien dissenting.

than from actual practice, is admissible,¹ and the fact that the witness's knowledge of the subject is limited to what he has derived from books is not a valid objection to his testimony. He is entitled to speak from the accepted facts of the science.² Physicians have been permitted to give knowledge and opinions confessedly *not* from their own observation and experience, but merely from reading and studying medical authorities.³ When books are referred to for authority, or to strengthen opinions, the opposition may bring the same books in evidence to test the witness's knowledge, or to contradict him or his opinion.⁴

Rules for the construction of cuts and embankments, given by an engineer, and though acknowledged to have been given solely from his recollections of what he had read in Mahan, Gillespie, Gilmore, and other authorities on engineering, were received as competent.⁵ It is therefore submitted that though books themselves are not admissible to prove the declarations they contain, yet their statements and opinions may be brought to the court and jury through the mouths of skilled witnesses. The expert engineer should, to that end, seek, collect, and prepare the opinions of learned authors to sustain his position and carry conviction to the minds of court and jury. If contents of books are to be introduced, they must be ushered in through the familiar acquaintance, and by the quotations and references, of skilled witnesses.

Books cannot be read to a witness and the questions plied to prove their contents.⁶ Their contents must have been previously known. Though they cannot be read to a witness for the purpose of showing facts set forth, yet questions may be read from a book on technical science for the purpose of making the questions more intelligible.⁷ The use of a standard authority on the subject of inquiry has been permitted to shape questions put to an expert, and he has been required to examine and read from the book for the purpose of testing his knowledge of the subject.⁸

Books may also be read to a jury in the argument by counsel, not to prove matters of opinion, or of fact, but to support arguments presented. Counsel should not be allowed to read to a jury from a *legal* text-book,⁹ and permission to read *the law* to the jury is within the discretion of the trial judge.¹⁰ Current schedules of prices in trade, calendars, life-tables, and so forth, have been admitted, and it is submitted that in the same cate-

¹ Fordyce v. Moore (Tex.), 22 S. W. Rep. 235; Hardiman v. Brown (Mass.), 39 N. E. Rep. 193.

² Marshall v. Brown (Mich.), 12 The Repr. 693 [1883], and 32 Albany Law Journal 54.

³ Rogers' Expert Testimony 28; City of Jackson v. Boone (Ga.), 20 S. E. Rep. 46.

⁴ Marshall v. Brown (Mich.) [1883], *supra*; People v. Vanderhoof (Mich.), *supra*; Taylor on Evidence.

⁵ Central R. R. Co. v. Mitchel, 63 Ga. 173.

⁶ 50 Mich. 148 and 296 and 629.

⁷ Thompson v. West, 56 Conn. 478.

⁸ Byers v. Nashville, C. & St. L. Ry. Co. (Tenn.), 20 S. W. Rep. 128.

⁹ Yarbrough v. State (Ala.), 16 So. Rep. 758.

¹⁰ Forbes v. State (Tex.), 29 S. W. Rep. 784.

gory can be classed standard tables of sines, cosines, logarithms, multiplication tables, etc.¹

In general, it may be stated that books will not be admitted as evidence of the facts they contain. Their statements cannot be used directly to prove the size or shape of a member of a structure, nor what is or is not a proper construction of a piece of work. If the engineer wishes to back up his assertions by the authority of books he must prepare himself upon the subject, and give others' opinions as his own. Questions as to materials, what is "a good and workmanlike manner," what is "hard-pan," cannot be proven by reading directly from a book.²

Whatever beliefs or opinions the engineer may wish to advance must be his own. He may have acquired them from reading or the study of books, he may mention books or cite authority, but he cannot read the books in court, nor literally quote the author's statements. He must express his own individual opinion and may give in support of his conclusions the fact that others have arrived at the same decision, or that other engineers hold to the same views.³

277. Witness may Use a Book, Chart, or Prepared Memoranda to Refresh His Memory.—What has been said need not convey the idea that the engineer's preparation requires him to memorize whole pages of printed matter, for he may take his books, maps, and notes into court and on to the witness-stand with him and refer to them, to refresh his memory, upon questions in doubt. He may draw up a written narrative, make written memoranda of a subject or transaction, and use it while under examination as a script to refresh his memory.⁴ If he is able to testify (1) that the statements contained in such memoranda are accurate in his present recollection, or (2) that from his present recollection the memoranda were accurate when made, he may refresh his memory by examination of memoranda regarding dates, figures, results of calculation, minutes of testimony, and the like, whether such memoranda has been made by the party himself or by any other person. An engineer may make use of a map made by him, with figures representing lengths of lines, areas, and quantities, and testify from it. Whether such maps and calculations, so employed, become evidence of themselves, is in dispute. If positively testified to by the witness, they are admissible; if sworn to, that the figures well and truly represent the true distances, quantities, and areas, they may become evidence. In the discretion of the court they may be allowed to go to the jury, and be taken out with them when they retire as a memoranda of the distances, areas, and quantities as sworn to by the engineer.⁵ As a witness he cannot read from his memoranda, even though

¹ *Morris v. Columbian Dock Co. (Md.)*, 25 Atl. Rep. 417; *Richmond & D. R. Co. v. Hisong (Ala.)*, 13 So. Rep. 209.

² *Lawson's Expert and Opinion Evdce.* 187-192. For an article on Books of Science as Evidence, in which many cases are

cited, see *Central Law Journal*, vol. 5, p. 439, and vol. 15, p. 88.

³ *Lawson's Exp. & Opin. Evdce.* 169 *et seq.*

⁴ *Best on Evidence* (Chamb. ed.) 227.

⁵ *Neff v. Cincinnati*, 32 Ohio St. 215;

made by himself; he can refresh his memory by looking at the writing, but he must testify from his recollections.¹ Even though the memoranda is not admissible as evidence, he may use it, if he knows it to have been correct when it was made, to refresh his memory, after which he must testify to the original facts.² The memoranda is not of itself competent evidence to prove the facts stated.³ In general, such memoranda employed by a witness to refresh his memory must be verified as correct⁴ before it can itself become evidence.⁵ If an engineer swear that the figures upon a plat representing lengths of lines, areas, and quantities are correct and represent the true distances, areas, and quantities, it may become evidence, and the trial court may in its discretion allow the jury to take the plat with them as a memoranda when they retire.⁶ If, however, the witness has no recollection of the facts contained in a memorandum independent thereof, yet testifies thereto in full, it is not error for the trial court to refuse to admit the memorandum itself as evidence.⁷

A witness may refresh his recollection by reference to any memoranda relating to the subject-matter to which his attention is directed on the stand, whether such memoranda is competent evidence or not, and then he may testify, if he has then any independent recollection of such subject-matter.⁸ This is not, however, a general rule.⁹

Memoranda of facts that occurred, must have been made at the time or recently after the event. If made weeks or months thereafter, they cannot be used to refresh the memory, nor can they if made at the recommendation of one of the parties.¹⁰ Memoranda made by a workman from day to day, in the ordinary course of business, may be used to show the days his employer worked on a certain building.¹¹ An architect's certificate has been admitted some time after the facts of the case, but from measurements and notes made contemporaneously with the work.¹² In general, a witness must swear to the facts contained, if he will give testimony of things in a document which he is using to refresh his memory.¹³

Cunningham v. Massena, etc., R. Co. (Sup.), 18 N. Y. Supp. 600.

¹ Wilde v. Hexter, 50 Barb. 448.

² Bonnette v. Gladfeldt, 11 N. E. Rep. 250 (Ills.) 1887; Meade v. White (Pa.), 8 Atl. Rep. 912 [1887].

³ Baum v. Reay (Cal.), 29 Pac. Rep. 117.

⁴ Elder v. Reilly (Minn.), 51 N. W. Rep. 226; City of Birmingham v. McPoland (Ala.), 11 So. Rep. 427.

⁵ Klepsch v. Donald (Wash.), 35 Pac. Rep. 621.

⁶ Neff v. Cincinnati, 32 Ohio St. 215.

⁷ Butler v. Chicago, B. & Q. R. Co. (Iowa), 54 N. W. Rep. 208.

⁸ Denver & R. G. R. v. Wilson (Colo. App.), 36 Pac. Rep. 67; McNeely v. Duff (Kan.), 31 Pac. Rep. 1061.

⁹ King v. Inhabitants, 2 A. & E. 210;

and see Commonwealth v. Burke, 114 Mass. 261; Merrill v. The Itasca & O. R. Co., 16 Wend. 586; Bissell v. Mich. Southern, etc., R. Co., 22 N. Y. 262; Halsey v. Sincebaugh, 15 N. Y. 485; Harvey v. United States, 113 U. S. 243.

¹⁰ Spring Garden Mut. Ins. Co. v. Evans, 15 Md. 54 [1859]; Howell v. Bowman (Ala.), 10 So. Rep. 640; see also Baum v. Reay (Cal.), 29 Pac. Rep. 417; Anderson v. Imhoff (Neb.), 51 N. W. Rep. 854.

¹¹ Boughton v. Smith (Sup.), 22 N. Y. Supp. 148.

¹² Sanders v. Hutchinson, 26 Ills. (Ct. of App.) 633 [1887]; also Cunningham v. M. S. & Ft. C. R. Co., 18 N. Y. Supp. 600, [1892], citing 114 N. Y. 498.

¹³ Harvey v. United States, 113 U. S. 243.

278. Use of Written Memoranda and Copies Thereof.—Bills for materials, drayage checks, and weigh checks received with materials delivered at works are only hearsay evidence of the quantities of materials purchased and put into a structure, when the witness does not know that they were correct, and was not present when the materials were delivered, and did not thereafter measure and inspect them.¹ Books of account, containing items for work done and materials furnished, the correctness of which was sworn to by a bookkeeper who did not see the work done or the goods delivered, and who made the entries from memoranda furnished by others, are inadmissible, where one who had personal knowledge of the doing of the work and the furnishing of the materials was present at the trial, and was not called to the stand.² However, the fact that books of account contain some errors does not, in the absence of evidence that the books were fraudulently falsified, necessarily render them incompetent.³

If the original memorandum has been lost or destroyed, the witness may use a copy to refresh his memory, if he testify that the figures or estimate to be used were made at the time of the measurement of the work and that they are correct, and also that the copy is a correct one.⁴ So held of a blue print.⁵ Proof of loss of books, so as to admit the testimony of the bookkeeper as to their contents, is sufficiently shown by his testimony that he made diligent search for the books, and found some of them in the cellar of the store, in some old rubbish, and among them the covers of the books in question, but the insides of them had been torn out and taken away, and he could not find them.⁶ The copy becomes the best evidence of the contents of the original book or document, and is admissible, while parol evidence of its contents, if it be a written instrument, is not admissible.⁷

A stenographer's notes of the witness's testimony given at a former trial, when the stenographer has shown that he took the notes and that they are correct, may be read to impeach the witness's present testimony, even though the stenographer has no recollection of what the witness said.⁸ So where the books of original account have been destroyed, the items therein may be proved by the ledger.⁹ A manager of a firm business, it seems, cannot use such a book to refresh his memory, if he did not make the entries, or see them made, nor assure himself of their correctness when the matters were fresh in his memory.¹⁰ Nor if such entries were made by a party to the suit in his own behalf.¹¹

¹ McCormick v. Saddler (Utah), 37 Pac. Rep. 332.

² Dodge v. Morrow (Ind. App.), 43 N. E. Rep. 153.

³ Levine v. Lancashire Ins. Co. (Minn.), 68 N. W. Rep. 855.

⁴ Anderson v. Imhoff (Neb.), 51 N. W. Rep. 854.

⁵ Currier v. B. & M. R. Co., 31 N. H. 225 [1855].

⁶ Stanfield v. Knickerbocker Trust Co. (Sup.), 37 N. Y. Supp. 600.

⁷ Dillon v. Howe (Mich.), 57 N. W. Rep. 109.

⁸ Klepsch v. Donald (Wash.), 35 Pac. Rep. 621.

⁹ McCrady v. Jones (S. C.), 15 S. E. Rep. 430.

¹⁰ Fritz v. Burgiss (S. C.), 19 S. E. Rep. 304; but see Levine v. Lancashire Ins. Co. (Minn.), 68 N. W. Rep. 855.

¹¹ Doty v. Smith (Sup.), 22 N. Y. Supp. 840.

It is proper to read to a witness extracts from evidence given by him on a previous trial to cause him to recollect the facts as he testified on a former trial;¹ and a witness, either on direct or cross examination, may be compelled to inspect a writing, if it is in his own handwriting or there is reason to believe it will refresh his memory.² The use of memoranda to refresh one's memory has been held a matter largely discretionary with the trial court.³

279. Use of Maps, Plans, Photographs, and Models in Court.—It being well established that memoranda, books, and maps may be employed to illustrate, explain, and prove the expert's opinions and testimony, the next subject for consideration is what preparations to make. First of all a complete understanding of the facts, circumstances, and surroundings of the case, and the preparation of diagrams, models, and other means of presenting them to the court and jury. The conditions and surroundings attending a problem are primary in the determination of results; small technicalities often make an entire change in the results and deductions to be drawn from certain facts. If possible, the locality should be visited and carefully examined, that the expert may be familiar with all its peculiarities. If the occasion requires it, a careful survey and map of the ground should be made. Samples and pieces may be taken of the soil, structure, and materials.

An *ex parte* map made by a witness, and shown to be correct, may be introduced, not as independent evidence, but to be considered by the jury in connection with other evidence.⁴ A civil engineer who has made a survey of the locality may testify that there was no obstruction, and that the headlight of a train would be visible from points in the neighborhood of the scene of a collision.⁵

280. Use of Photographs as Evidence.—Photographic views should be taken from selected positions, which, if sworn to as being true representations of what they profess to be, may be introduced in evidence.⁶ The value of photographic views cannot be overestimated. They are invaluable in case of destruction of buildings or other structures by wind, flood, or fire. They are much easier to comprehend than are maps or plans by jurymen, and they are quite difficult of misrepresentation, and are now generally accepted as evidence. They show elevations and depressions, distances and shapes as they naturally appear to the eye, and are more convincing to both jury and judge. They are quickly and cheaply made, and are comprehensible to the most uneducated and unskilled, and are received for nearly all purposes and in all cases where the original object cannot be had. It must be

¹ *Ehrisman v. Scott* (Ind. App.), 32 N. E. Rep. 867.

² *State v. Stanton* (N. C.), 19 S. E. Rep. 96.

³ *Michigan Ins. Co. v. Wich* (Colo.), 46 Pac. Rep. 687.

⁴ *Poling v. Ohio River R. Co.* (W. Va.), 18 S. E. Rep. 782; *State v. Harr* (W. Va.),

17 S. E. Rep. 794; *Roderiquez v. State* (Tex.), 22 S. W. Rep. 978; *McVey v. Darkin* (Pa.), 20 Atl. Rep. 541 [1890].

⁵ *Chicago, etc., Ry. Co. v. Chambers* (C. C. A.), 68 Fed. Rep. 148.

⁶ *Howard v. Russell*, 12 S. W. Rep. 525; *German T. S. v. City of Dubuque*, 64 Iowa 736.

disposition to present one's views plainly and clearly for what they are worth, a careful avoidance of any effort to force conviction into the minds of the court, is far more effective than any attempts to show how very simple and plain the one side is and how preposterous and unheard of are the opinions of the opposite side. A simple acknowledgment that contrary opinions exist, and the fact that witness is familiar with them, has considered and weighed both sides of the question, and has come to his conclusion by study, observation, and reasoning, will carry with them much stronger convictions than any amount of blustering.

Force cannot exist without counter resistance in mechanics, and this is equally true in argument. The moment a witness insists or undertakes to impose his views, that moment he arouses resistance in his listeners, which renders his efforts the more unavailing. Much depends upon the good opinion of the court. It is within its power to permit or deny the engineer the privilege of testifying, to determine whether the witness comes within the requirements of an expert, which is in nowise a question for the jury.¹

283. Trial Court Determines the Privileges of an Expert Witness.—The preliminary question whether a witness offered as an expert has the necessary qualifications is for the court, and is largely within its discretion.² Unless it appears from the evidence that the trial court's decision was erroneous or founded on an error in law, it is conclusive.³

If it be apparent that expert testimony would tend to assist the jury in coming to a conclusion on the facts, it is not error for the trial court to admit it.⁴ It has been held no error for the trial judge to refuse to receive the expert testimony of a professor of civil engineering who has made the law of moving bodies a study and can tell how far a train will move by its momentum, as to the distance a train would travel, on a question to contradict the testimony of other witnesses testifying from practical experience, on appeal.⁵

The manner and extent to which an expert may refresh his recollections by references to memoranda or books is also determined by the presiding judge—a discretion that may be exercised with reference to the circumstances of the case and sometimes with reference to the conduct and bearing of the witness upon the stand.⁶

In the furtherance of justice, the court may in its discretion depart from

¹ Jones v. Tucker, 41 N. H. 546 [1860]; Mut. F. I. Co. v. Alvord (C. C. A.), 61 Fed. Rep. 752.

² Sneda v. Libera (Minn.), 68 N. W. Rep. 36; Helfenstein v. Medart (Mo. Supp.), 36 S. W. Rep. 863; Beckett v. N. W. Masonic Aid Ass'n (Minn.), 69 N. W. Rep. 923.

³ Manghan v. Burns Estate (Vt.), 23 Atl. Rep. 583; St. Louis & S. F. Ry. Co. v. Bradley, 54 Fed. Rep. 630; Howland v. St. Ry. Co. (Cal.), 42 Pac. Rep.

983; see also Santa Cruz v. Enright (Cal.), 30 Pac. Rep. 197; and Chateaugay O. & J. Co. v. Blake, 12 Sup. Ct. Rep. 731, as to the capacity of an ore crusher; Campbell v. Russell, 139 Mass. 278 [1885], and cases cited.

⁴ State v. Hendel (Idaho), 35 Pac. Rep. 836.

⁵ Blue v. Aberdeen & V. E. R. Co. (N. C.), 23 S. E. Rep. 275.

⁶ Johnson v. Coles, 21 Minn. 108 [1874]; Wabash R. Co. v. Defiance (Ohio), 40 N. E. Rep. 89.

the usual order of introducing testimony. It may permit experts to testify before the establishment of facts by the other witnesses.¹ It determines the propriety of questions asked, and it is within its discretion to reject questions put to witnesses, if in its opinion they do not bear upon the question at issue. Questions to experts are in a large measure hypothetical and remote, and are likely to receive a much more liberal consideration under a good impression on the part of the judge than in the face of distrust and fear.² After the witness has given his own professional opinion in reference to what he has seen and heard, or upon hypothetical questions, it is then within the court's discretion to limit further interrogatories as to what other scientific men have said on such matters, or in respect to the general teachings of science thereon.³

The extent to which the temper and disposition of a witness may be shown on cross-examination is largely within the discretion of the trial court;⁴ and the extent to which it may be pursued to test his memory is within the discretion of the court.⁵ In cross-examination a witness may be asked in regard to any interest he may have in the result of the trial, as affecting his credibility,⁶ and he may be asked as to whether the examinations made by him were made in a careful or a superficial manner. Such a question is not objectionable as substituting the opinion of the witness for the judgment of the jury on that point.⁷

In conclusion, it may be said that too much care cannot be taken in the preparation for the expert witness-stand, and any man (engineer) who conscientiously does his duty will merit all that he is likely to get for his services.

284. Behavior of Expert Witness in Court—When will Expert Testimony be Admitted.—An expert's duties in court may be embraced in two classes: (1) The suggestions and promptings he may give to the attorney in examination of other witnesses, and (2) his offices and privileges while upon the stand himself. Little can be said upon the former, as the character and amount of assistance must depend upon the character, disposition, and private ideas of the individuals, and their skill, practice, and methods.

As a general rule, opinions of witnesses are not admissible as evidence; they must speak as to facts within their knowledge; but upon questions of skill or science, with which the jury are not familiar, men who have made the subject-matter of inquiry the object of their particular attention or study are permitted to give their opinions. They are admissible (1) when the question involves subjects which are beyond the determination and full

¹ *City of Denver v. Dunsmore*, 7 Colo. 328 [1884].

² *Harland v. Lillienthal*, 53 N. Y. 438 [1873]; *People v. Angaberry*, 97 N. Y. 501 [1884].

³ *Davis v. United States*, 17 Sup. Ct. Rep. 360.

⁴ *Czewzka v. Benton-Bellefontaine Ry. Co.* (Mo. Sup.), 25 S. W. Rep. 911.

⁵ *Noblin v. State* (Ala.), 14 So. Rep. 767.

⁶ *Blenkiron v. State* (Neb.), 58 N. W. Rep. 587.

⁷ *Northern Pac. R. Co. v. Urlin*, 15 Sup. Ct. Rep. 840.

understanding of the judge and jurors, and (2) when the witness offered is fully qualified to give the required information.

The rule determining the subjects upon which experts may testify and the rules prescribing the qualifications of experts are matters of law, but whether a witness offered as an expert has those qualifications is a question of fact to be decided by the court at the trial.¹ We have chiefly to deal with the law, as we cannot determine the judges' opinions of individual cases (or person). Courts are inclined to limit the testimony of experts to the rules now in use, and to confine witnesses to facts in all cases where practicable, and to leave the jury to exercise their judgment and experience upon the facts proved. *Facts* may be specifically contradicted, and if witnesses testify falsely they are liable to punishment for perjury, while *opinions* may not be proved positively wrong, and false *opinions* may be given without fear of punishment.²

The fact that a witness may know more of, or may better comprehend, the subject than the jury is not sufficient to authorize opinion evidence, but it must relate to some trade, profession, science, or art in which the expert has more skill, and can pass better judgment than jurymen of average intelligence.³ If the facts can be placed before the jury, and they are of such a nature that jurors generally are as competent to form an opinion in reference to them and to draw inference from them as experts, then the opinions of witnesses are not competent, and such evidence should only be received in case of necessity.⁴ A question which elicits a reply based on a mere arithmetical calculation is not objectionable as calling for expert testimony.⁵

If the relation of facts and their probable results can be determined without special skill or study, the facts must go to the jury, who will be left to draw their own conclusions and to form their own opinions.⁶ If the inquiry relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled witnesses is not admissible.⁷ The true test is not whether the subject-matter is common or uncommon, or whether many persons or a few have some knowledge of it, but whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge any aid to the court or jury in determining the questions at issue.

285. Some Questions Held Not to Require Experts to Determine.—It has been held that a question "whether, under circumstances proven, it was a proper time to burn brush," was not a question requiring the assistance of

¹ Jones v. Tucker, 41 N. H. 546.

² Furgeson v. Habbell, 97 N. Y. 507 [1884].

³ Staffords v. City of Oskaloosa, 64 Ia. 251 [1885]. Overby v. Chesapeake & O. Ry. Co. (W. Va.), 16 S. E. Rep. 813.

⁴ Witmark v. Manhattan Ry. Co. (N. Y.

App.), 41 N. E. Rep. 78.

⁵ Belair v. C. & N. W. R. Co., 43 Ia. 662; Van Wyclen v. City of B., 118 N. Y. 424 [1890].

⁶ Overby v. Chesapeake & O. Ry. Co., (W. Va.), 16 S. E. Rep. 813.

experts,¹ even though the witness offered had many years of experience in clearing land by fire, and had observed the effect of wind on fires, in the locality in question, and had visited the land and made a plan of it. On the same ground opinion evidence has been rejected as to whether a horse should have been tied,² whether stairs were located in a safe place in a building,³ as to the effect of water in disintegrating mortar of a wall,⁴ as to the value of real estate,⁵ whether a survey was actually located on the ground or was made in the office from plats,⁶ and whether wood was, or was not, rotten.⁷ Generally questions of value, as of a horse or land, do not require expert knowledge. Witnesses who are not architects, builders, or contractors may be allowed to state their opinions as to the worth of a building from a general knowledge of it without being able to estimate the value of any of the materials entering into its construction.⁸

It has been held not to require an expert to prove that a wall might have cracked as a result of defects in the wall and foundations to show that the wall was defective;⁹ whether boards piled in a certain manner will protect a cargo of perishable freight;¹⁰ if a certain arrangement of machinery is dangerous;¹¹ as to the safety and fitness of a belt-fastening when a piece of the belt and the fastenings are before the jury;¹² as to how much limestone is beneath a railroad and its value per ton;¹³ as to what hard-pan is and whether any was found;¹⁴ as to how much a man can improve his handwriting in a short time.¹⁵ In determining the explosive character of dust in a bin, a chemist, not shown to have had any experience with the same kind of dust outside of his laboratory, is not competent to testify that, if fire came in contact with it, an explosion would occur.¹⁶

Witnesses cannot give any opinions as to the legal effect of documents or events,¹⁷ nor will their opinion be received as to the amount of damages suffered in an action for damages;¹⁸ nor as to whether a certain ailment would bring to a man the knowledge that he was not in perfect health.¹⁹

¹ *Furgeson v. Hubbell*, 97 N. Y. 507.

² *Stone v. Bishop* (Vt.), 22 Rept'r. 319 [1886].

³ *Underwood v. Waldron*, 33 Mich. 232 [1876].

⁴ *Naughton v. Stagg*, 4 Mo. App. 271 [1877].

⁵ *Schwander v. Birge*, 46 Hun 66.

⁶ *Reast v. Donald* (Tex.), 19 S. W. Rep. 795.

⁷ *Reynolds v. Van Beuren*, 31 N. Y. Supp. 827.

⁸ *Springfield Fire & Marine Ins. Co. v. Payne* (Kan. Sup.), 46 Pac. Rep. 315; *but see Little Rock, etc., Ry. Co. v. Alister* (Ark.), 34 S. W. Rep. 82; *and Joske v. Pleasants* (Tex. Civ. App.), 39 S. W. Rep. 586 [1897].

⁹ *Turner v. Haar* (Mo.), 21 S. W. Rep. 737.

¹⁰ *Schwinger v. Raymond* (N. Y.), 11 N.

E. Rep. 952 [1887].

¹¹ *Freeburg v. St. Paul Plow Works* (Minn.), 50 N. W. Rep. 1026; *Kaufman v. Maier* (Cal.), 29 Pac. Rep. 481.

¹² *Harley v. Buffalo C. Manfg. Co.* (N. Y. App.), 36 N. E. Rep. 813.

¹³ *Reading & P. R. Co. v. Balthaser* (Pa.), 13 Atl. Rep. 294 [1888].

¹⁴ *Currier v. B. & M. R. R.*, 34 N. H. 498.

¹⁵ *McKeone v. Barnes*, 108 Mass. 344 [1871].

¹⁶ *Shufeldt v. Searing*, 59 Ill. App. 341.

¹⁷ *Thompson v. Brannin* (Ky.), 21 S. W. Rep. 1057.

¹⁸ *Tingley v. City of Providence*, 8 R. I. 493; *affirmed*, *Brown v. Providence R. Co.*, 12 R. I. 238 [1879].

¹⁹ *Mut. L. Ins. Co. of N. Y. v. Simpson* (Tex.), 28 S. W. Rep. 837.

286. Expert Cannot Determine Questions which the Jury are to Decide.

—The opinion of witnesses upon the precise questions the jury is to determine is competent only when the nature of the case is such that facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon and no better evidence than such opinions is attainable.¹ The object of all questions to experts should be to obtain their opinions as to the matter of skill or science which is in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. Questions that require the witness to draw conclusions of fact should be excluded.² Opinions cannot be asked upon facts or questions that are to be determined by the judge or jury, but experts may give scientific opinions, under an assumption of facts similar to or identical with those presented in the case.³ Such questions are termed hypothetical, the witness being asked if certain facts testified to are true, if he can form an opinion, and what his opinion is.⁴ The opinion of witnesses cannot be asked directly upon the circumstances of the case being tried, but hypothetical cases very similar may be described and the opinion of the expert asked upon such hypothetical case.⁵ So when the question to be determined was whether the state or its employees were negligent in making changes in a bridge, a question to the person who built it whether he "left the bridge, in his judgment, safe for the ordinary uses of a highway bridge," was held inadmissible, as he was thereby permitted to determine the question which was at issue and to be decided by the board (jury). And where the negligence of the party injured by the fall of the bridge was at issue, it was held improper to admit the testimony of an engineer that the load was excessive and that the stones were negligently united and moved over the bridge, though it would have been proper to have admitted him to testify to the supporting power of the bridge or any one of its panels or any one of its stringers.⁶ So where a scaffold has given way, a witness should not be allowed to testify as to whether, in his opinion, the scaffold was "put up right,"⁷ though he may, as an expert, show the effect of a knot or cross-grain upon the strength of a timber supporting the scaffold.⁸ Where the question at issue is the faulty construction of a railroad, an engineer, testifying as to the construction of the track and the probability of deposits of sand thereon in rainy weather, could not, on cross-examination, state

¹ *Van Wycklin v. City of Brooklyn*, 118 N. Y. 424 [1890]; *Pacheco v. Judson Mfg. Co.* (Cal.), 45 Pac. Rep. 833; *Ewing v. Goode* (C. C.), 78 Fed. Rep. 442.

² *Hunt v. Lowell Gas Lt. Co.*, 8 Allen 169; *B. & L. Tpke. Co. v. Cassell*, 66 Md. 419 [1886]; *Butler v. Chicago, B. & Q. R. Co.*, 54 N. W. Rep. 208; *Yeaw v. Williams* (R. I.), 23 Atl. Rep. 33 [1892]; *Mauer v. Ferguson*, 17 N. Y. Supp. 349.

³ *Rogers' Expert Testimony* 39.

⁴ *The C. R. J. & P. R. R. Co. v. Moffit*, 75 Ill. 524.

⁵ *McDonald v. State* (N. Y.), 27 N. E. Rep. 358 [1891]; *Eastman v. State*, 27 N. E. Rep. 358; *Hughes v. Muscatine Co.*, 44 Iowa 672.

⁶ *Mauer v. Ferguson*, 17 N. Y. Supp. 349.

⁷ *Boettger v. Scherpe & K. A. I. Co.* (Mo.), 27 S. W. Rep. 466.

that the engineers on the road were all aware of that fact, this being a mere inference.¹

287. Hypothetical Questions may be Asked of an Expert Witness.—The hypothetical question must not call for an inference which is within the province of the jury to draw.² The witness should not be called on for his opinion on disputed questions of fact, or as to the credibility of any of the witnesses.³ A witness is not to be asked if he believes another told the truth. An opinion is worth nothing as against absolute knowledge, fact, or law, and the expert should furnish the facts on which his opinion is founded. In asking questions, the facts should be clearly stated, and the question should be clearly within the expert's special knowledge. If question is clearly within expert's special knowledge, you can sometimes ask the very point which is to be decided. The facts assumed need not have been proved, nor can the question be objected to on the ground that the facts assumed are not true.⁴ The testimony offered *should*, however, establish every fact embraced in a hypothetical question, or it may be objected to and the jury be instructed to disregard that part of the evidence.

It is error to receive answers of expert witnesses to hypothetical questions which assume the existence of facts of which *no* evidence is offered;⁵ but any facts may be assumed which the evidence tends to establish.⁶ If the engineer has heard or read the evidence, or is familiar with the facts of the case, he may be asked his opinion on the assumption that they are true. If the facts are not disputed, the question should include them all. The facts upon which an opinion is based must always be laid before the court and jury. This must be done in order that the jury may judge for themselves, and for the further reason that other experts may be called to controvert the opinion.⁷ It is erroneous to permit a witness to be asked to state his opinion, based on his recollection of the testimony of another witness.⁸ The assumed facts should be stated hypothetically in the question. An expert bridge-builder has been properly allowed to give his opinion as to the sufficiency of a timber like unto one that broke in a staging.⁹

Some courts have held that such questions should state all the facts,¹⁰ while others have allowed questions that embrace facts deducible from the evidence,¹¹ and others have permitted questions that assume any facts that

¹ Union Pac. Ry. Co. v. O'Brien, 16 Sup. Ct. Rep. 618; Darling v. Thompson (Mich.), 65 N. W. Rep. 754.

² Prentiss v. Bates (Mich.), 50 N. W. Rep. 637.

³ Stoddard v. Town of Winchester (Mass.), 32 N. E. Rep. 948.

⁴ Deig v. Moorhead (Ind.), 11 N. E. Rep. 458 [1887].

⁵ North Amer. Acc. Ass'n v. Woodson (C. C. A.), 64 Fed. Rep. 689.

⁶ Hicks v. Citizens' Ry. Co. (Mo.), 27 S.

W. Rep. 542; Bever v. Spangler (Ia.), 61 N. W. Rep. 1072; Neudeck v. Grand Lodge, 1 Mo. App. 330.

⁷ Frankfort v. Manhattan Ry. Co., 33 N. Y. Supp. 36.

⁸ Bedford Belt Ry. Co. v. Palmer (Ind. App.), 44 N. E. Rep. 688.

⁹ Stanwick v. Butler-Ryan Co. (Wis.), 67 N. W. Rep. 723.

¹⁰ Prentiss v. Bates (Mich.), 50 N. W. Rep. 637.

¹¹ Peoples v. Vanderhof (Mich.), 39 N. W.

the evidence fairly tends to prove, though they may not be fairly proved.¹ It has been held *not* necessary that the hypothetical question propounded to an expert witness shall embrace all the facts as to the particular subject under investigation.² If the facts on which the opinion is based are disputed, their truthfulness may be assumed hypothetically.³

It has been held even that a hypothetical case stated need contain only such facts as tend to support counsel's theory of the case.⁴ Testimony that a thing has been done three or four times a day for a month will support a question whether a certain result would follow if a thing had been done as many as one hundred times.⁵ But an inquiry as to how much water would be thrown from a certain opening, "under a pressure such as was on the pumps," was denied, when there was no evidence as to the amount of pressure.⁶ Generally, an expert witness should not be allowed to testify to hypothetical questions based upon facts a part of which only have been proved.⁷ The fact that the names of the parties to the suit are mentioned in putting hypothetical questions is not objectionable.⁸

It is safer to embody all the particulars on which his opinion is asked, though the trial court may in its discretion allow questions to be put in other form.⁹ Decisions are found which hold that the opinion of an expert witness must be based on proved or admitted facts, or upon such facts as are assumed to exist for the purpose of a hypothetical question, and it is not a sufficient objection to such question that the facts stated therein had not been put in evidence, nor can it be objected to upon the ground that the facts assumed are not true.¹⁰ In an action for work and labor performed, it is proper for plaintiff to put to ordinary witnesses hypothetical questions in regard to the value of the services alleged to have been performed.¹¹ An opinion may be asked of a physician as to what would be the result of a disease in the natural and ordinary course—to wit, that the plaintiff would never be any better and never be able to strengthen his limbs.¹²

288. Witness Acquainted with Facts of Case.—If the engineer has personal acquaintance with the subject-matter, and a knowledge of the

Rep. 28 [1888]; *People v. Durrant* (Cal.), 48 Pac. Rep. 75 [1897].

¹ *Hall v. Rankine* (Iowa), 54 N. W. Rep. 217; *Kelly v. Perrault* (Idaho), 48 Pac. Rep. 45 [1897].

² *Davidson v. State* (Ind. Sup.), 34 N. E. Rep. 972.

³ *Frankfort v. Manhattan Ry. Co.*, 33 N. Y. Supp. 36.

⁴ *Bowen v. City of Huntington* (W. Va.), 14 S. E. Rep. 217.

⁵ *K. C., M. & B. R. Co. v. Webb* (Ala.), 11 So. Rep. 888.

⁶ *Vermillion A. W., etc., Co. v. Vermillion* (S. D.), 61 N. W. Rep. 802.

⁷ *In re Mason*, 14 N. Y. Supp. 434; *semble*, Ill. *Silver M. & M. Co. v. Roff* (N.

M.), 34 Pac. Rep. 544.

⁸ *Lee v. Heuman* (Tex.), 32 S. W. Rep. 93.

⁹ *Roreback v. Penna. Co.* (Conn.), 20 Atl. Rep. 465 [1890]; *In re Miller's Estate*, 26 Pittsb. Leg. J. (N. S.) 428; *Hammerburg v. Met. St. Ry. Co.*, 1 Mo. App. Rep. 578.

¹⁰ *Deig v. Morehead* (Ind.), 11 N. E. Rep. 458 [1887]; *see also* *Baltimore & L. T. Co. v. Cassell*, 66 Md. 419 [1886].

¹¹ *Graves v. Pemberton* (Ind. App.), 29 N. E. Rep. 177.

¹² *Stromm v. N. Y., L. E. & W. R. Co.*, 96 N. Y. 305; *see* *Cole v. Fall Brook C. Co.* (Sup.), 34 N. Y. Supp. 572.

facts and circumstances surrounding it, he may be permitted to give his opinion directly without any hypothesis, or if there is no dispute as to the facts, the question may be direct, upon the facts of the case. The facts must be stated, for even though the witness may have read testimony and all the facts he cannot be asked for his opinion. There must be a specific question covering the facts or the assumed facts.¹

Thus an engineer who has had charge of the erection of a wall may testify whether or not it was properly and compactly constructed.² If he has inspected and made a proper investigation of a bridge he may give his opinion whether the abutments of the bridge were skillfully and properly placed.³ He may testify as to the effect of decay of the bridge timbers upon the bridge itself, and as to the ordinary life of such timbers as were used in the bridge,⁴ and as to whether in his opinion the decay set in before or at the time of the accident, when the inspection was made a year thereafter, and as to whether a superintendent was qualified.⁵ If the evidence be conflicting, *i. e.*, if the facts are not admitted, then questions must be put hypothetically.

In engineering cases, and to engineering experts, questions may usually be put directly. Generally, the circumstances are such that an engineer may visit the scene of the difficulty and investigate the facts for himself;⁶ but a hypothetical question put to an expert witness, calling upon him to take into account his own personal knowledge of facts, is not permissible.⁷ If he has inspected the work or the wreck, and has qualified himself by stating the facts upon which his opinion is based, his testimony may be admitted even when he is not an expert.⁸

289. Weight and Value of an Expert's Testimony is Determined by Jury.—Although it is the office of the judge to determine who are experts, what are proper questions, and how they be put, yet the truthfulness, weight, and importance of his testimony is decided by the jury. It is for them to determine from the facts, the conduct and behavior of the witness, how much to believe and what to believe.⁹ The judgments of witnesses are not as a matter of law to be accepted by the jury in the place of their own decisions. Juries are not precluded from exercising their own ideas

¹ *In re Snelling's Will* (N. Y.), 32 N. E. Rep. 1006.

² *Pullman v. Corning*, 9 N. Y. 93.

³ *Conrad v. Trustees*, 16 N. Y. 158 [1857].

⁴ *Morgan v. Fremont Co* (Ia.), 61 N. W. Rep. 231.

⁵ *Washington C. & A. T'p'ke v. Case* (Md.), 30 Atl. Rep. 571; *Buckalew v. Tennessee, C. I. & R. Co.* (Ala.), 20 So. Rep. 606.

⁶ *O'Keefe v. St. Francis' Church*, 59 Conn. 551 [1890].

⁷ *Bramble v. Hunt*, 22 N. Y. Supp. 842.

⁸ *Galveston, H. & S. A. Ry. Co. v. Dan-*

iels (Tex.), 28 S. W. Rep. 548, failure of a bridge; *accord*, *Denver, T. & Ft. W. Ry. Co. v. Pulaski I. D. Co.* (Co'o.), 35 Pac. Rep. 910, bridge abutments obstructing an irrigation ditch; *Helfenstein v. Medart* (Mo. Sup.), 36 S. W. Rep. 863, speed of a bursted grindstone; *Snedd v. Libera* (Minn.), 68 N. W. Rep. 36, thickness and strength of a cistern wall; *Egan v. Dry Dock, etc., R. Co.* (Sup.), 42 N. Y. Supp. 188, time to corrode a boiler.

⁹ *Spring Co. v. Edgar*, 99 U. S. 645 [1878].

and knowledge upon the subject; it is their province to weigh the opinions offered, the time devoted, and other circumstances, and to apply to them their own experience and knowledge of the character of such questions.¹ The opinions of experts cannot be substituted for the common-sense and judgment of the jury; the purpose of their own introduction is to supplement the general knowledge and experience of the jury.² It is therefore error for a judge to charge a jury that expert testimony should be met by other expert testimony, and if it is not, it (the jury) should regard their opinion as correct. Such evidence is to be weighed like other testimony by the jury, and a defendant to a suit is not bound to employ rebutting experts.³

290. Expert Witness must Not Try to Determine Questions whose Determination Is for the Court or Jury.—The construction of written instruments is for the court or jury, and not for the surveyor or engineer (witness); the fact that a surveyor has scaled the map by which land is described, and found it incorrect, cannot be admitted to prove title to land in dispute.⁴ Nor can the opinion of other witnesses be admitted to show the true meaning and location of boundary lines in dispute.⁵ Or, in the language of the court, "Experts cannot be called to give their opinions on subjects of this character. Witnesses are competent to show lines and measurements, but the construction of written instruments is for the court alone."⁶ Although a surveyor may in some instances be called upon to explain or account for a mistake in a survey,⁷ or give his opinion as to how he would locate a tract similar to the one in controversy,⁸ yet he may not give his own construction of the description and survey, nor determine what are the controlling calls of the deed.⁹ Though his evidence may be admitted to aid in locating the land by the description in the deed,¹⁰ he cannot determine the location of a tract according to a description when it is a duty devolving upon a jury.¹¹ He may not testify that there was no conflict, as that question is to be determined by the jury.¹² A question whether there were any marks to show that any persons, other than those mentioned, got any of the land, when the surveyor has, as an expert, fully explained a plat, and all that he saw or could find in regard to the lines therein, calls for witness's opinion as to facts, and is leading.¹³ He is a qualified witness to test and

¹ *Head v. Hargrave*, 105 U. S. 45.

² *Leittensdorfer v. Kind's Admx.*, 7 Colo. 436 [1884].

³ *People v. Vanderhoof* (Mich.), 39 N. W. Rep. 28 [1888]; *The Conqueror*, 17 Sup. Ct. Rep. 510; *Ewing v. Goode* (C. C.), 78 Fed. Rep. 442.

⁴ *Twogood v. Hoyt*, 42 Mich. 609.

⁵ *Public School v. Risley's Heirs*, 40 Mo. 356.

⁶ *Norment v. Fastnaught*, 1 McArthur 515.

⁷ *Forbes v. Caruthers*, 3 Yeates 527.

⁸ *Farr v. Swan*, 2 Pa. St. 245.

⁹ *Whittlesley v. Kellogg*, 28 Mo. 404; *Tate v. Pratt* (Cal.), 44 Pac. Rep. 1061.

¹⁰ *Cornwell v. Cornwell*, 91 Ill. 414. [1879]; *affirming Colcord v. Alexander*, 67 Ill. 584; *Ormsby v. Ihmsen*, 34 Pa. St. 462.

¹¹ *Schultz v. Lindell*, 30 Mo. 310; *Blumenthal v. Roll*, 24 Mo. 113; *Randolph v. Adams*, 2 W. Va. 519.

¹² *Bugbee Land Co. v. Brents* (Tex. Civ. App.), 31 S. W. Rep. 695.

¹³ *Rapley v. Klugh* (S. C.), 18 S. E. Rep. 680.

apply data on a map, in determining their sufficiency as guides by which to ascertain a location.¹ The interpretation of a contract is for the court, though it contains technical terms, and it is error to allow an expert witness to state how he understands it; the expert may explain the meaning of such terms.²

If skilled in mason work, his testimony is admissible to show the meaning of the terms "mason work" as used in a contract for the construction of water-works, and whether they include the laying of certain pipes;³ and if a builder, he may testify as to the meaning among mechanics of "smoke-stack."⁴

291. Qualifications of an Expert—Who may Be an Expert Witness.—

After having determined that the question is one requiring expert testimony, it next becomes necessary to inquire if the witness offered is qualified. To render an opinion admissible, it must first be shown that the witness possesses superior skill and scientific knowledge in relation to the question. 'This must be done before the opinion can be asked.'⁵ An expert has been defined as nothing more than a man of experience in the particular vocation to which the inquiry relates, or as one having peculiar knowledge or skill in reference to the subject-matter of inquiry, or simply as a person instructed by experience.⁶ They have been defined as "men of science,"⁷ "persons professionally" acquainted with the sciences or practice,"⁸ "conversant with the subject-matter,"¹⁰ "persons of skill,"¹¹ "experienced persons,"¹² possessed of some particular science or skill respecting the matter in question.¹³

No precise knowledge is required. It is enough if the witness shows an acquaintance with the subject as to qualify him to give an opinion.¹⁴ He is not incompetent to testify because he has acquired his knowledge from books, but he must have made the subject of inquiry a professional study and a calling. It cannot be understood that a lawyer may, by a few weeks' study of engineering books, qualify himself to testify as an expert engineer, or *vice versa*.¹⁵ A witness who testifies that he is a mechanical engineer, that he graduated several years before from a university, and since then has been engaged in civil and mechanical engineering; that he has given some study to the investigation of the strength of grindstones, and the safe rate of speed at which such stones of various size might be run, and that he

¹ Grand R. L. & D. R. Co. v. Chesebro (Mich.), 42 N. W. Rep. 66 [1889].

² Cargill v. Thompson (Minn.), 59 N. W. Rep. 638.

³ Elgin v. Joslyn (Ill.), 26 N. E. Rep. 1090 [1891].

⁴ Skelton v. Fenton Elec. L. & P. Co. (Mich.), 58 N. W. Rep. 609.

⁵ Page v. Parker, 40 N. H. 59 [1860].

⁶ Louisville, E. & St. L. R. Co. v. Donagan, 111 Ind. 179; 58 Ala. 290; 92 Ind. 464; 102 Ind. 138.

⁷ Folkes v. Chadd, 3 Doug. 157.

⁸ Jones v. Tucker, 41 N. H. 546.

⁹ Strickland on Evidence.

¹⁰ Best on Evidence.

¹¹ Rochester v. Chester, 3 N. H. 349, 365.

¹² Peterborough v. Jaffrey, 6 N. H. 462, 464.

¹³ Beard v. Kirk, 11 N. H. 397.

¹⁴ Terre Haute v. Hudnutt, 112 Ind. 542.

¹⁵ Rogers' Expert Test. 28; People v. Thackery (Mich.), 66 N. W. Rep. 562.

thinks he can state what is a safe rate of speed, is qualified to testify as an expert in regard thereto.¹ Mere opportunities for observation are not sufficient; thus the opinion of a civil engineer on the sufficiency of a highway was held incompetent,² while the opinions of professional road contractors have been held to be competent.³

An editor of a stock journal was rejected as an expert on diseases of sheep, having had no practical experience or veterinary practice;⁴ but personal experience with and care of stock will qualify a witness.⁵ A professor of veterinary medicine, employed for many years by the Department of Agriculture in the investigation of diseases of animals, is competent to testify as to the nature and symptoms of Texas cattle fever. He may state what districts of Texas are infected with the cattle fever, though he has never visited those districts, the knowledge gained by him in the correspondence of the department, and in the investigation of such diseases as to the places of their origin or prevalence, not being properly hearsay.⁶

A druggist who did not make an analysis of a compound, and who was unable to do so, and only judged its character by taste and smell, cannot testify as to a preparation, and that it contained alcohol;⁷ but a miller of twenty years' experience, accustomed to analyze flour by a process used more or less by others, may testify as an expert as to the component parts of flour, though he is not a practical chemist.⁸ The objection that expert witnesses based their opinions of a stated question upon a crude and insufficient analysis does not affect the admissibility of the evidence, but its sufficiency only.⁹

The evidence offered through an expert must be confined to the subject-matter in which he is skilled, experienced, or learned. An engineer cannot testify as an expert in medicine, nor a painter in regard to the framing of a building, or its construction.¹⁰ Nor can a brick and stone mason give an opinion as to what caused the floors and walls of a building to collapse.¹¹ It has therefore been held that a witness familiar with earth dams could not testify as to a dam built of wood,¹² and that the apparent safety of an embankment cannot be judged by one who has merely seen it collapse.¹³

One who has been a civil and hydraulic engineer for several years is qualified

¹ Helfenstein v. Medart (Mo. Sup.), 36 S. W. Rep. 863.

² Benedict v. City, 44 Wis. 495.

³ Taylor v. Town of Monroe, 43 Conn. 43; accord, Bergen Neck Ry. Co. v. Pt. Breeze F. & J. Co. (N. J.), 30 Atl. Rep. 584; Wheeler & W. Mfg. Co. v. Buckout (N. J. Sup.), 36 Atl. Rep. 772.

⁴ Rogers' Expert Testimony 83

⁵ Pearson v. Zehr (Ill.), 29 N. E. Rep. 854; *semble*, State v. Dixon (La.), 16 So. Rep. 589.

⁶ Grayson v. Lynch, 16 Sup. Ct. Rep. 1064.

⁷ Dane v. State (Tex.), 35 S. W. Rep. 661.

⁸ Davis v. Mills (Mass.), 40 N. E. Rep. 852.

⁹ State v. Martin (S. C.), 25 S. E. Rep. 113.

¹⁰ Kilbourne v. Jennings, 38 Ia. 533.

¹¹ Peteler Portable Ry. Mfg. Co. v. Northwestern A. Mfg. Co. (Minn.), 61 N. W. Rep. 1024.

¹² Weidekind v. Twolume Co. W. Co. (Cal.), 25 Pac. Rep. 811.

¹³ Central R. Bkg. Co. v. Kent (Ga.), 10 S. E. Rep. 965.

to testify as an expert in matters touching civil and hydraulic engineering.¹ An engineer who examined a ditch two months after it was abandoned by the contractors, and found the original stakes, showing the depth of the ditch, and was able to verify his estimate from such stakes, is competent to testify to the cost of completing the ditch.² His testimony has been admitted to prove that stakes were surveyors' stakes;³ that piles of stones and marks upon trees were monuments of a boundary;⁴ that a particular line was marked by government surveyors.⁵ They have been permitted to give results of surveys made, and the relative position of the line to existing monuments, fences, and buildings;⁶ their opinions have been allowed upon the location of boundary lines which had not previously been officially located.⁷ These, however, cannot be allowed if the true location of the boundary is a question upon which the jury is to pass.* A surveyor may testify in such a case that in his opinion certain marks upon a tree were corner or line marks, but he may not testify to his opinion that a particular tree is the corner of a grant in question.⁸

Engineers experienced in construction are frequently called, and cases are frequent where they have given opinions in that branch of engineering. Examples as to the time required to construct and complete a railroad,⁹ to show what is a reasonable time in which a contract shall be performed;¹⁰ as to the value of the work done,¹¹ or the cost of construction of a house;¹² as to whether a bridge was skillfully constructed with reference to a creek;¹³ as to the proper size of the base of certain columns;¹⁴ to show the strength of materials, and to show that a structure was not properly constructed to sustain the weight to which it was subjected;¹⁵ to establish that a crack in iron machinery could have been ascertained in certain ways;¹⁶ as a defect in a car-wheel by the hammer test;¹⁷ to prove the faulty construction of a dock;¹⁸ that in order properly to carry out a construction contract, certain methods of erection and certain work done were necessary;¹⁹ and what the rule is as to constructive measurements.²⁰

¹ Egger v. Rhodes (Cal.), 37 Pac. Rep. 1037; and see 5 B. & A. 64.

² McDonald v. Dodge County (Neb.), 60 N. W. Rep. 366.

³ McGrann v. Hamilton (Conn.), 19 Atl. Rep. 376 [1890].

⁴ Davis v. Mason, 4 Pick. 156.

⁵ Barron v. Cobleigh, 11 N. H. 557; Wallace v. Goodall, 18 N. H. 439; 24 Ala. 390.

⁶ Messer v. Regunter, 32 Ia. 312.

⁷ Kinsley v. Crane, 34 Pa. St. 146.

⁸ Clegg v. Fields, 7 Jones' Law (N. C.) 37; Tate v. Fratt (Cal.), 44 Pac. Rep. 1061.

⁹ L. E. & St. L. Ry. Co. v. Donnegan, 111 Ind. 179.

¹⁰ Goddard v. Cresfield Mills (C. C. A.), 75 Fed. Rep. 818.

¹¹ Crawford v. Wolfe, 29 Iowa 567.

¹² Woodruff v. Imp. F. Ins. Co., 83 N. Y. 133.

¹³ Bellinger v. N. Y. Central R. Co., 23 N. Y. 42.

¹⁴ Lynch v. Paris L. & G. E. Co. (Tex.), 15 S. W. Rep. 208 [1891].

¹⁵ Callan v. Bull (Cal.), 45 Pac. Rep. 1017.

¹⁶ Pacheco v. Judson Mfg. Co. (Cal.), 45 Pac. Rep. 833.

¹⁷ Pittsburgh, etc., Ry. Co. v. Sheppard (Ohio Sup.), 46 N. E. Rep. 61.

¹⁸ Munroe v. Godkin (Mich.), 69 N. W. Rep. 244.

¹⁹ Haver v. Tenney, 38 Iowa 80 [1875]; see also Hamilton v. Railroad Co., 36 Iowa 81.

²⁰ Ambler v. Phillips (Pa.), 19 Atl. Rep. 717.

* See Secs. 286 and 290, *supra*.

Engineers, architects, and surveyors may in general testify to any opinions which belong peculiarly to their occupation and business.¹ An engineer who has acted as such on construction of a work may testify to his opinion whether it was properly built at a certain point, and whether it was constructed in the usual manner; and so may a witness who, though not a civil engineer, has had experience in railroad construction, and is familiar with the road;² and an engineer may testify as to the necessary capacity of a sewer,³ or whether a cellar would be water-tight if built according to specifications.⁴

The rules determining the subjects upon which experts may testify and the rules prescribing the qualifications of experts are matters of law; but whether a witness offered as an expert has those qualifications is a question of fact to be decided by the court at the trial.⁵ The fact that a witness offered as a chemical expert had abandoned his studies as a chemist and become a druggist does not render him incompetent,⁶ and the same may be said of an engineer or architect who has given up his professional work for teaching or writing.

Practical mechanics of many years' experience may testify as to the measurement of masonry,⁷ as to the amount and value of labor, based upon a given state of facts and their personal knowledge to a certain extent of the work done;⁸ that a wall though a little out of plumb is just as valuable for the purpose for which it was built;⁹ and blacksmiths may testify as to the quality and condition of a piece of iron.¹⁰

If a witness is not an expert on the subject of inquiry, he cannot be permitted to give an opinion on the subject. It is error therefore to admit the opinions of witnesses as to overflow of lands due to railroad embankments, unless such witnesses have peculiar knowledge of such matters.¹¹ A civil engineer with a long experience in railroad work, and in the same vicinity, was held a competent witness to give an opinion as to whether it was possible for an embankment to back water on to certain lands;¹² as was a resident who for twenty-six years had been familiar with a stream and knew from observation what had obstructed or would obstruct its flow, though he was not an expert in building embankments, bridges, and culverts;¹³ and a witness having twenty years' experience in the construction of railroads to

¹ *Chamberlain v. Dunlop* (Sup.), 8 N. Y. Supp. 125.

² *St. L. & T. Ry. v. Johnston* (Tex.), 15 S. W. Rep. 104 [1891].

³ *Hession v. Wilmington* (Del.), 27 Atl. Rep. 830.

⁴ *McNight Stone Co. v. New York* (Sup.), 43 N. Y. Supp. 139.

⁵ *Jones v. Tucker*, 41 N. H. 546 [1860].

⁶ *Haas v. Green* (Com. Pl.), 27 N. Y. Supp. 347; *Bears v. Copley* 10 N. Y. 93.

⁷ *Shulte v. Hennesy*, 40 Iowa 352 [1875].

⁸ *Crawford v. Wolf*, 29 Iowa 567 [1870].

⁹ *Stiles v. Neillsville M. Co.* (Wis.), 58 N. W. Rep. 411.

¹⁰ *L. N. A. & C. R. Co. v. Berkly* (Ind.), 35 N. E. Rep. 3.

¹¹ *Gulf C. & S. F. Ry. Co. v. Hepner* (Tex.), 18 S. W. Rep. 441; *K. C. Ft. S. & M. R. Co. v. Cook* (Ark.), 21 S. W. Rep. 1066.

¹² *St. L. I. M. & S. Ry. v. Lyman* (Ark.), 22 S. W. Rep. 170, 213.

¹³ *Ethridge v. San Antonio Ry., etc., Co.* (Tex.), 39 S. W. Rep. 204.

his credit, after describing the manner in which the culvert was constructed, may testify that it was not properly constructed.¹ A person whose knowledge of coal veins and overhead and underlying strata is entirely theoretical is not competent to testify as an expert as to the cause of the breaking in of the roof of a mine which he had never examined, and of which he had no knowledge except from the testimony of witnesses in the case.²

Where a witness qualifies as an expert, and states that certain indentations on a drawbar were made by a round instrument, he should be allowed to state what, in his opinion, that instrument was.³ An expert engineer may give his opinion that certain culverts through an embankment would materially help in draining certain lands;⁴ and that from certain statements given in the testimony of another engineer there is a certain quantity of stone in a wall.⁵

Evidence is admissible as to different methods employed by the profession, and as to who are standard authors, and their several modes of treatment;⁶ as to what it was worth to build a structure;⁷ as to the usual and proper way of removing paint;⁸ as to the construction, strength, and sufficiency of a building;⁹ to prove that black means white, in showing a usage of trade;¹⁰ that "one ton" was used to include a pile or heap;¹¹ that work on a job was completed as soon as practicable under the circumstances;¹² and current prices of materials may be shown by schedule of established prices in the trade.¹³ The reasonable value of professional services as those of an engineer, architect, or physician, may be shown by an expert in the same profession.¹⁴ The expert opinion cannot be based upon his knowledge and acquaintance of the client or patient, or of the latter's circumstances, but must be founded upon his knowledge of the character of the services.¹⁵ The qualifications of such witness to testify as to the value of services may be tested by the opinions of other experts.¹⁶ An expert carpenter who has seen only the outside of a building may testify as to its value, upon a description of its interior.¹⁷

To determine handwriting an expert may give his opinion that the body

¹ *Bonner v. Mayfield* (Tex.), 18 S. W. Rep. 305.

² *Lineoski v. Susquehanna Coal Co.* (Pa. Sup.), 27 Atl. Rep. 577.

³ *Galveston H. & S. A. Ry. Co. v. Briggs* (Tex.), 23 S. W. Rep. 503.

⁴ *Willits v. C. B. & K. C. R. Co.* (Iowa), 55 N. W. Rep. 313.

⁵ *Moerling v. Smith* (Ind.), 34 N. E. Rep. 675; *see also* *Vulcanite Paving Co. v. Ruch* (Pa.), 23 Atl. Rep. 555.

⁶ *Broadhead v. Wiltse*, 35 Iowa 429; *citing also* 6 Iowa 380, 386, and 30 Iowa 456.

⁷ *O'Keefe v. St. Francis' Church*, 59 Conn. 551 [1890].

⁸ *First Cong. Church of Rockland v.*

Holyoke Mut. Fire Ins. Co. (Mass.), 33 N. E. Rep. 572.

⁹ *Turner v. Haar*, (Mo.) 21 S. W. Rep. 737.

¹⁰ *Mitchel v. Henry*, 15 Ch. D. 181.

¹¹ *Barry v. Bennett*, 7 Met. 254.

¹² *Stiles v. Neillsville Mill Co.* (Wis.), 58 N. W. Rep. 411; *Chamberlain v. Dunlop* (Sup.), 8 N. Y. Supp. 125.

¹³ *Morris v. Columbian Iron Works* (Md.), 25 Atl. Rep. 417.

¹⁴ *Lee v. Heuman* (Tex.), 32 S. W. Rep. 93.

¹⁵ *Buehler v. Reich* (Com. Pl.), 18 N. Y. Supp. 114 [1892].

¹⁶ *Pierce v. Boston* (Mass.), 41 N. E. Rep. 227.

and signature of an instrument were written by the same person,¹ but the genuineness of a signature cannot be proved by simple comparison.² The correctness of the opinion of an expert on handwriting can usually be shown by ocular demonstration; it should always be accompanied by such demonstration.³

A court will not allow an engineer who has planned and superintended the erection of a culvert to testify that the plan of it was a judicious and proper one, or that it was a properly constructed one, in an action against his employers for damages resulting from the washing away of the culvert.⁴

A non-expert witness should not be allowed to state that, if the timbers of the bridge had been larger and sound, the bridge would have been sufficient for the uses of the railroad company, except in extraordinary rainfalls.⁵ Whether a certain kind of wood is strong or weak is a matter of fact, though it requires knowledge of and experience with such wood, and the exercise of judgment on such experience, to become aware of the fact.⁶

292. Witness may Employ Practical Illustrations and Experiments.—In advancing his opinion the engineer is not confined to the mere assertion of his opinion. He may give his reasons and offer explanations in support of them. This must be done in his examination-in-chief, and it is important, for if the witness can clearly represent the reasons of his conclusions, they are likely to have much more weight with a jury than a mere naked opinion of a witness, however large his experience or extensive his observation.⁷

The engineer may employ almost any reasonable means to explain his reasoning and deductions, such as blackboards,⁸ diagrams,⁹ maps,¹⁰ models, and photographs.¹¹ In testifying as to a disputed boundary, a surveyor may use a diagram to illustrate his evidence or make it intelligible to the jury, although the diagram was not made by himself, and is not shown to contain a perfectly accurate description of the lands. A county surveyor testifying as to a line which he has himself run, may state that it was run correctly, and may state the facts on which he bases his opinions of its correctness—as that he found the “corner stake,” “bearing-points,” “marked trees,” etc.¹² When the accuracy of a plat is verified by a witness as correctly representing the relative situation and location of certain lots with reference to other property, it is not error to allow such a witness, on his examination, to use the plat in pointing out to the jury such lots, their situation and location.¹³

¹ *Reese v. Reese*, 90 Pa. St. 89 [1879].

² *Bevan v. Atlanta Nat. Bk.* (Ill.), 31 N. E. Rep. 679; *The State v. Owen*, 73 Mo. 440 [1881].

³ *In re Gordon's Will*, 26 Atl. Rep. 268.

⁴ *Galena & C. U. R. Co. v. Welch*, 24 Ill. 31 [1860].

⁵ *Galveston H. & S. A. Ry. Co. v. Daniels* (Tex.), 20 S.W. Rep. 955.

⁶ *Gerbig v. New York, L. E. & W. R. Co.* (Sup.), 27 N. Y. Supp. 594.

⁷ *Lewiston S. M. Co. v. Androscoggin*

W. P. Co. (Me. Sup. Ct.), June [1886].

⁸ *McKay v. Lasher*, 121 N. Y. 477 [1890].

⁹ *State v. Henderson*, 29 W. Va. 147.

¹⁰ *Shook v. Pate*, 50 Ala. 91 [1874]; *Calumet Ry. v. Moore* (Ill.), 15 N. E. Rep. 764 [1888]; *Neff v. Cincinnati*, 32 Ohio St. 215.

¹¹ *Rippe v. C. D. & M. R. Co.*, 23 Minn. 18 [1876].

¹² *Shook v. Pate*, 50 Ala. 91 [1874].

It has been held error to refuse to permit a diagram of the place to be taken out by the jury, it having been prepared by a civil engineer who testified to its correctness and it having been admitted in evidence.¹

It is generally a matter within the discretion of the presiding officer of the court, to what extent practical tests may be employed. It may determine whether persons, models, and things shall be exhibited in court to the jury, and the court may properly refuse permission to bring into court such models, as for example, two planks and a cross-bar,² or a section of a human body to show the exact location of certain parts,³ or a sample of needlework by a person who has lost her capacity to do such work.⁴ There is no rule requiring a person or thing to be produced or brought into court for exhibition, nor is it necessary to account for its non-production.⁵ The trial court may in its discretion permit the jury to go from the court-room and view the premises,⁶ and the court's refusal to permit such excursion is not reviewable on appeal.⁶ Where counsel had knowledge of the fact that a part of the jury had visited the place of the accident, he cannot, in default of objection at the time of the trial, complain of the misconduct of the jury on appeal.⁷

Plaster casts of a person's mouth and the teeth supposed to fit them,⁸ impressions of a horse's mouth in wax and plaster,⁹ weapons used and clothes worn,¹⁰ are instances recorded. Courts have permitted chemical tests of the ink with which a paper has been written,¹¹ and it has been held an error to exclude expert testimony showing the appearance of a note under the microscope, where the jurors could use such microscope for themselves; and notwithstanding a witness testified that almost daily for five years he had used a microscope in the examination of handwriting, and that one without experience could not so use it, though he might if he had intelligence and judgment as to the use of the different object-glasses.¹²

Building materials, such as a piece of a column used by a contractor in the construction of a building, have been admitted in evidence in an action for breach of contract on part of owner, for not allowing the contractor to complete the contract because the columns used, were not such as were required by the contract, nor is it error to allow the jury to take such pieces

¹ *Western & A. R. Co. v. Stafford* (Ga.), 25 S. E. Rep. 656; *accord*, *Clegg v. Metropolitan Ry. Co.* (Sup.), 37 N. Y. Supp. 130.

² *Mayor v. Pool* (Tenn.), 19 S. W. Rep. 325 [1892].

³ *Knowles v. Crampton* (Conn.), 11 Atl. Rep. 593 [1888].

⁴ *Youngstown Bridge Co. v. Barnes* (Tenn.), 39 S. W. Rep. 714.

⁵ *Gilmanton v. Ham*, 38 N. H. 108; *King v. N. Y. Central, etc., R. Co.*, 72 N. Y. 607; *Dickinson v. City of Poughkeepsie*, 75 N. Y. 64; *Commonwealth v. Sturtivant*,

117 Mass. 122, spots of blood; *Herman v. State*, 41 N. W. Rep. 171.

⁶ *Board of Comm'rs v. Caster* (Ind.), 33 N. E. Rep. 986; *see also* 14 Gratt. 448.

⁷ *City of Shelbyville v. Brant*, 61 Ill. App. 153.

⁸ *Commonwealth v. Webster*, 5 Cush. 295.

⁹ *Earle v. Lefler*, 46 Hun 9.

¹⁰ *Best's Evdce.* (Chamb. Ed.) 198.

¹¹ *In re Monroe Estate*, 5 N. S. 552.

¹² *Bridgman's v. Corey's Estate* (Vt.), 20 Atl. Rep. 273 [1890].

to the jury-room.¹ The results of practical experiments made, such as the stopping of a train of cars under the same conditions,² may be shown in evidence. In another case an expert witness was not allowed to testify that, as an experiment, he fired a bullet through a plank, to ascertain the size of the hole made as compared with the bullet.³

292A. Judicial Notice.—Courts frequently take notice of certain notorious facts as being *prima facie* true and as not needing proof. Some things are so well known to all that they cannot be denied, but whether or not the court will take judicial notice may depend largely upon the trial justice. If self-evident or so notorious as to require no proof, then expert testimony will not be admitted to prove or disprove them.

The appellate court will not take judicial notice of the rules of the court below,⁴ of the rules of the county court,⁵ or of city ordinances;⁶ but a city court may take notice of city ordinances.⁷ Courts will take judicial notice of a statute incorporating a town in a certain county,⁸ or that a city is duly incorporated under the laws of the state.⁹

Courts have taken judicial notice of the following facts, viz.: that a certain day of a certain month was Sunday;¹⁰ that the September term of the circuit court does not extend beyond October;¹¹ of the population of cities and towns according to the authorized census reports;¹² of mortality tables showing the natural expectancy of duration of one's life at a given age.¹³

A court will take judicial cognizance of the geographical facts and features of the country, of the existence of a large body of water in the state,¹⁴ of its rivers and mountains,¹⁵ of the boundaries of an incorporated city, and of the location and course of a river frequently mentioned in the public statutes of the state;¹⁶ that a certain county in the state is in an arid region.¹⁷

The court will take judicial notice of the organization of the Dominion of Canada;¹⁸ of the fact that several railroads run into a city;¹⁹ that the streets run in certain directions, and where they begin and end;²⁰ how the

¹ *Linch v. Paris L. & G. E. Co.* (Tex.), 15 S. W. Rep. 208 [1891].

² *Byers v. Nashville, C. & St. L. Ry. Co.* (Tenn.), 29 S. W. Rep. 128.

³ *Evans v. State* (Ala.), 19 So. Rep. 535.

⁴ *Gudgeon v. Casey*, 62 Ill. App. 599.

⁵ *Kessel v. O'Sullivan*, 60 Ill. App. 548.

⁶ *Weaver v. Snow*, 60 Ill. App. 624; *Shauffer v. Baltimore* (Md.), 31 Atl. Rep. 439.

⁷ *City of McPherson v. Nichols* (Kan.), 29 Pac. Rep. 679.

⁸ *Stone v. Halstead*, 62 Mo. App. 136.

⁹ *Penna. Co. v. Horton* (Ind. Sup.), 31 N. E. Rep. 45.

¹⁰ *Brennan v. Vogt* (Ala.), 11 So. Rep. 893; *Williamson v. Brandenburg* (Ind.), 32 N. E. Rep. 1022.

¹¹ *Anderson v. Anderson* (Ind. Sup.), 40 N. E. Rep. 131.

¹² *Hawkins v. Thomas* (Ind. App.), 29 N.

E. Rep. 157; *State v. Marion Co. Ct.* (Mo.), 30 S. W. Rep. 103, 31 S. W. Rep. 103.

¹³ *Kansas City, M. & B. R. Co. v. Phillips* (Ala.), 13 So. Rep. 65.

¹⁴ *Mossman v. Forrest*, 27 Ind. 233; *People v. Brooks* (Mich.), 59 N. W. Rep. 444.

¹⁵ *Winnepiseogee Lake Co. v. Young*, 40 N. H. 420; *Com. v. Desmond*, 103 Mass. 445; and see 12 Amer. & Eng. Ency. Law 169.

¹⁶ *De Baker v. Southern Cal. Ry. Co.* (Cal.), 39 Pac. Rep. 610.

¹⁷ *McGhee Irrigating Ditch Co. v. Hudson* (Tex. Sup.), 22 S. W. Rep. 398.

¹⁸ *Calhoun v. Ross*, 60 Ill. App. 309.

¹⁹ *Texas & P. Ry. Co. v. Black* (Tex.), 27 S. W. Rep. 118.

²⁰ *Skelly v. New York El. R. Co.*, 27 N. Y. Supp. 304.

houses are numbered, and on which side are the odd numbers;¹ but not of the distance between the various streets of the city of Chicago.²

Courts have taken judicial notice of the government surveys and the legal subdivision of public lands;³ of the initials used in surveys and descriptions;⁴ of the magnetic variation of a needle from the true meridian;⁵ that railroad lines are marked out and the grades fixed by the company's engineer;⁶ that trains running upon a railroad are run, directed, and controlled by the owners of the road;⁷ that it is within the scope of a section-foreman's agency to keep both the track and right of way in proper condition;⁸ of what everybody knows incident to railway travel;⁹ but *not* that C. B. & Q. R. Co. means the Chicago, Burlington and Quincy Railroad Company;¹⁰ that the telephone has become an ordinary medium of communication;¹¹ of the art of photography, the mechanical and chemical processes employed, and the scientific principles on which they are based, and their results.¹²

The court has recognized the fact that a man sitting down on top of a car could not strike his head against an overhead bridge that was 4 feet 7 inches above the top of the car, for such a man would have to have been 9 feet high, which was never known;¹³ that a person with an artificial leg can stand;¹⁴ that whisky, apple-brandy, and a whisky cocktail are intoxicating;¹⁵ that kerosene is inflammable,¹⁶ but not that it is refined coal-oil or earth-oil.¹⁷

These examples are sufficient to show what the courts *may* take judicial notice of, but there can be no certainty that they will do so. The expert must be prepared to prove anything and everything necessary to the elucidation and explanation of the truth, and, if necessary, by practical example. All courts have not had the same experience and training and cannot, therefore, be equally well informed. One might know less of cocktails and applejack and more of coal-oil and kerosene, while another might have lived in many districts of this country and never have seen the common crude petroleum, or coal-oil.

293. Right to Use Models and Make Tests Rests with Trial Court.—

While illustrations bearing more directly upon engineering are the use of

¹ *Canavan v. Stuyvesant*, 27 N. Y. Supp. 413.

² *North Chicago St. R. Co. v. Cheetham*, 58 Ill. App. 318.

³ See cases 12 Amer. & Eng. Ency. Law 171.

⁴ *Kile v. Yellowhead*, 80 Ill. 208.

⁵ *Bryan v. Beckley*, Litt. Sel. Cas. (Ky.) 91.

⁶ *Alabama M. Ry. Co. v. Coskey* (Ala.), 9 So. Rep. 202.

⁷ *South, etc., R. Co. v. Pilgreen*, 62 Ala. 305.

⁸ *Mobile & O. R. Co. v. Stinson* (Miss.), 21 So. Rep. 522.

⁹ *Dowdle v. Hendrie*, 46 Mich. 498.

¹⁰ *Accola v. Chicago, B. & Q. R. Co.*, 70

Iowa 185.

¹¹ *Globe Printing Co. v. Stohl*, 23 Mo. App. 451.

¹² *Luke v. Calhoun Co.*, 52 Ala. 115.

¹³ *Hunter v. New York, O. & W. Ry. Co.* (N. Y.), 23 N. E. Rep. 9.

¹⁴ *New Jersey Traction Co. v. Brabban* (N. J.), 32 Atl. Rep. 217.

¹⁵ *Schlicht v. State*, 56 Ind. 173; *Thomas v. Commonwealth* (Va.), 17 S. E. Rep. 788; *United States v. Ash* (D. C.), 75 Fed. Rep. 651.

¹⁶ *Wood v. N. W. Ins. Co.*, 46 N. Y. 421; *State v. Hayes*, 78 Mo. 307.

¹⁷ *Bennett v. N. British Ins. Co.*, 8 Daly (N. Y.) 471.

maps, monuments, and descriptions in deeds as evidence of titles; valuable evidence furnished by accurate and verified models; instances in which the jury is taken to view works and premises in question,—the employment of all these is in general within the discretion of the trial court, and an expert witness should not, under any circumstances, be surprised if he be refused the privilege of making practical tests or illustrations. His privileges will probably depend upon the importance of his tests, the leisure of the court, and the disposition, impressions, and intelligence of the court and jury.

294. An Expert's Advice to Fellow Experts.—Before drawing the division of this subject to a close, the author adds a few maxims recommended by an eminent engineer of experience as an expert, who concludes:¹

"That the court always understands that an engineer has been previously advised in regard to questions upon which his direct examination will be made, and that he has prepared himself by study and reasoning to apply to the case in hand all of the scientific principles which are necessary to elucidate it.

"It is, therefore, unwise to attempt to conceal from the court that the engineer has been in consultation with the lawyers upon the side upon which he has been called, or that he has been paid or is to be paid professional prices for his services.

"No provocation on the part of a lawyer will justify an uncourteous reply, and it is unwise to give back a sharp or witty answer.

"If the lawyer uses improper language in addressing the witness, the latter may appeal to the judge.

"If questions requiring study and research are put to the witness, he may reply, 'I have not considered the subject under that aspect sufficiently to reply,' or 'I shall require a little consideration before I can reply; I will make a note of your question, and answer it as soon as possible.'"²

"A witness is often called upon to express an opinion on some subject which is a matter of exact or approximate measurement and calculation; it is often impossible for him to make such calculations accurately in the presence of a roomfull of people. His proper course, under such circumstances, is to take a note of the question and inform the counsel that he will make the calculation and give it in writing. In strict law, however, a witness on the stand is not compelled to make any calculations except those of a simple and elementary character."³ It is absurd to call upon the

¹ William J. McAlpine before the American Society of Civil Engineers, 1870.

² This is justified by the courts, for an engineer can no more be expected to answer questions embodying tedious calculations than can a chemist be required to

tell the contents of a stomach on the stand. *Eastham v. Riedell*, 125 Mass. 585, and *Insurance Co. v. Tobin*, 32 Ohio St. 96.

³ *Newlan v. Dunham*, 60 Ill. 233. An expert witness will not be required to give a categorical answer to a question of

* Although an engineer may not be required to make calculations upon the witness-stand, he may be required to give the basis upon which they were or should be made. If it is the intention of the opposition to show that the engineer is unable to make the estimate and do the necessary calculations, he may be asked if he can make them.—Ed.

engineer to perform duties of a professional character when upon the stand as a witness or to give professional opinions as it would be for a lawyer, under the same circumstances, to be called upon for legal opinions upon some grave question of law."

The distinguished engineer continues by adding, "that for many years the engineer abroad has been called into a new field of duty, viz., that of acting as associate or adviser to the counsel in regard to all professional (engineering) points of the case."

295. Experts as Assistants in Examination of Witnesses by Attorneys.—

It must be evident that an engineer could not perform such functions without a fair knowledge of the rules and laws of expert testimony, upon which ground the author will excuse the considerable depth to which he has gone into the subject. This position has long since become a field of large practice and high compensation, and no lawyers now venture upon the conduct of a case involving important engineering or architectural questions without assistance from engineers or architects. A professional man appointed under Code Civ. Proc. § 873, to make an examination of a subject-matter of an action, is an officer of the court, and should be sworn.¹ An attorney has not the right to be present, nor to have men present, at the physical examination of his female client, made by order of the court pursuant to Code Civ. Proc. § 873, providing for the physical examination of a female plaintiff by a female physician.¹

296. Compensation—Reward for Services as an Expert Witness.—The question of extra compensation to an expert who is called to give an opinion which requires the exercise of professional skill and study is one about which there is no general rule. The decisions are wholly at variance, and different states have established their own laws. Some have enacted laws giving extra compensation, and some have denied it altogether. Rhode Island, North Carolina, and Iowa² have statutes allowing such additional compensation as the court may determine. Massachusetts courts have allowed experts to be selected in criminal cases and their compensation to be paid out of the public treasury.³ Indiana and Illinois, on the other hand, refuse to acknowledge the right to extra compensation, and require experts to attend their courts and give their opinions with no compensation more than that allowed to any other witness.⁴

Courts have usually expressed the opinion that services of an expert witness should be compensated, but the decisions rendered as to whether he must be remunerated before he testifies are opposed. Physicians have been committed for contempt of court and fined for refusing to testify until

opinion evidence, which he says he cannot answer categorically. *Quinn v. O'Keeffe* (Sup.), 41 N. Y. Supp. 116.

¹ *Lawrence v. Samuels* (City Ct.), 44 N. Y. Supp. 602.

² See Statutes of the States.

³ Rules of Practice in Chancery, 104 Mass. 573.

⁴ Indiana Revised Statutes, 1881, p. 94, § 504.

their fees were paid or secured to them.¹ In Arkansas it has been held that a physician is not entitled to any more than the regular witness fees for his expert testimony in respect to a post-mortem examination he had made.²

In these cases the physician had been employed in attendance of the case or had made examinations of the subject of inquiry and investigation. They were criminal cases, in which it was the duty of every man to lend his efforts in aid of justice; but one of those cases held that it made no difference whether the judicial investigation was of a civil or criminal nature.³ Two decisions were reached in Indiana, where a physician had been called, not on account of any knowledge of the facts of the case, or because he had had any connection with it, but merely for his opinions on professional questions, and it was held that he need not answer questions involving professional skill and knowledge.⁴ This decision was, however, opposed by two dissenting judges,⁵ and can have little weight to-day from the fact that a statute has been passed opposed to the decision.⁶

It is established law in England that a witness selected and called for his opinion need not testify without extra compensation. The earlier decisions in this country followed the English law, and higher courts refused to sanction penalties and fines imposed for such neglect or refusal to give professional opinions, without extra compensation. The skill and knowledge of experts were regarded as professional services and as property, which were no more at the mercy of the public than were the goods of the merchant or the crops of the farmer, and the decision was based upon the broad principle of the constitution that "property [services] shall not be taken for public use without just compensation."

On the same principle, it has been held that interpreters cannot be compelled to serve a court without compensation.⁷ If a man cannot be compelled to translate the language of a foreign people, how can the scientist be required to divulge the secrets and interpret the laws of nature?

On the other hand, it is claimed that the opinion of a skilled witness is no more his property than is the *time* of any witness. That a physician's vocation is that of healing and treating diseases, that of a lawyer is the investigation, securing, and protection of his clients' rights and property, and *semble* of engineering, that an engineer's professional practice or business is that of the designing, direction, and construction of works, and that in every case their opinions are not the object of their studies, but a necessary result of their calling.

¹ *Ex parte Dement*, 53 Ala. 389, 5 Tex. App. 374, 112 Ill. 540.

² *Clark County v. Kerstan* (Ark.), 30 S. W. Rep. 1046.

³ *Ex parte Dement*, 53 Ala. 389.

⁴ *Buchanan v. State*, 59 Ind. 1; s. c., 17

Alb. L. J. 242.

⁵ *Dills v. State*, 59 Ind. 15.

⁶ Indiana Revised Statutes 1881, p. 94, § 504.

⁷ *Rogers' Expert Testimony* 256.

297. Expert Witness in Civil and Criminal Cases Distinguished.—

Whether the power of a court in civil cases, to summon an expert to appear, and to compel him to testify to professional opinions, in cases of which he has no knowledge of the facts, and with which he has had no connection, would be upheld by higher courts, cannot be foretold. In criminal cases where the law is endeavoring by its every effort to do justice to a man who has been charged with committing a great crime, it may be that public policy demands that every citizen should assist in the administration of the laws of his country; but in civil cases it is submitted that the necessity does not exist, and such a usurping of a man's freedom and appropriation of his services is an outrage, in a professedly free country, not countenanced by the autocratic governments of Europe.

There is no doubt a strong tendency to maintain this imperious practice of appropriating professional services to public use, but it must be accomplished by judicial legislation if extended to cases in which the witness has no interests nor knowledge. If the witness in the beginning professes his utter ignorance of the facts of the case, claims to have no knowledge of the parties or the circumstances of the complaint, it will require an exercise of power not often manifest to compel him to testify.

298. If Expert Has Knowledge of Facts of Case, He must Testify.—If an expert takes the stand and without protestation testifies in part to facts and circumstances, it is quite likely that the court will insist on his answering questions calling for his professional opinion. This belief is supported by a recent Illinois case, in which a physician who had attended the victim, and had testified to some facts of the case, refused to give his professional opinion as to the causes and results of his investigations until his professional fee was paid or secured to him. He was fined as for contempt, which was supported on appeal.¹ In Arkansas it has been held that in criminal cases where no preliminary examination or preparation has been required, an expert who testifies can demand no compensation in addition to the usual fees allowed witnesses.² In Colorado court of appeals it has been held that if the witness testifies in a criminal case in obedience to a subpoena, without making in advance any demand for special compensation, he can recover only the statutory witness fees.³

It has been held that where an agreement is made by one to go into court at a future day and testify as an expert as to a matter which he had examined as a civil engineer, he is entitled to recover the reasonable compensation (in addition to the statutory fees) promised him therefor, though he is afterwards summoned and paid the regular statutory fees, and does not then claim extra compensation, or give notice that he will make such claim, and, though testifying, and advising counsel as to questions

¹ Wright v. The People, 112 Ills. 540 Rep. 451.
[1884].

² Board Com'rs Larimer County v. Lee
³ Flinn v. Prairie Co. (Ark.), 29 S. W. (Colo. App.), 32 Pac. Rep. 841.

to be asked him and other witnesses, he is not asked any question as an expert.¹

An expert witness employed by an attorney to testify in a proceeding may recover compensation therefor from the party represented by the attorney, in the absence of evidence that the witness had notice of the limitation of the attorney's authority, or agreed to look solely to the attorney for compensation.²

299. Expert's Knowledge, Experience, and Character may be Inquired Into.—When an expert takes the stand he must answer under the same rules as ordinary witnesses, however embarrassing the questions may be. Not only his character, reputation, and truthfulness may be inquired into and tested, but he is subject to an examination as to his professional qualifications, his knowledge, accuracy, and learning.

For the annoyance and risks of injury to a man's business consequent to undergoing such an examination and for the information thus established, the courts must declare no compensation is due or they cannot support their decisions.

300. If Expert Cannot Collect Extra Compensation, then No Extra Preparation Can be Required.—However doubtful the law may be as to extra compensation to experts for professional opinions, it is certain that if an expert can demand no more pay than an ordinary witness, so certain is it that he cannot be compelled to make any more preparation. He may refuse to make investigations, inquiries, or any preparation whatever for the occasion of the trial. If an engineer, he cannot be required to inspect works, or to investigate a casualty, or to make estimates and computations; but whether, having made them with the expectation or under the promise of compensation, he can be compelled to testify to his results and conclusions before being paid, is an unsettled question. Some inference may be drawn from a case of a physician who, having made a *post-mortem* examination of a body, was compelled to give the results of it without extra compensation, though the court acknowledged it could not have ordered him to make the examination for the purpose of testifying.³ Where there has been no special contract with the witness, and it is not shown that the refusal to pay him extra compensation would be an injustice, the court trying the case has no power to order payment of extra fees to the witness.⁴

301. Legislation is Needed to Improve Expert Testimony.—In conclusion, it may be said that the law of expert testimony is in a very unsatisfactory condition, and sadly needs legislation. It should be the duty of every engineer to use his efforts to secure that legislation, each in his own state.

¹ *Barrus v. Phaneuf* (Mass.), 44 N. E. Rep. 141.

² *Mulligan v. Cannon* (Sup.), 41 N. Y. Supp. 279.

³ *Rogers' Expert Testimony* 261.

⁴ *Board Com'rs Larimer County v. Lee* (Colo. App.), 32 Pac. Rep. 841.

First, some law should be enacted to abolish the present system of allowing the parties or their attorneys to select the experts. Secondly, compensation should be allowed, and either fixed by law or power given the court to determine it. Thirdly, experts should be selected by the court or appointed by the government, to do away with the present practice of using experts, on the witness-stand, to win cases.

No men or body of men have more regret that "engineering science has become a commodity, and that engineers have" (in some instances) "become hired advocates" than engineers themselves; and to their own efforts chiefly must they look for such a change. A well-directed crusade by the organized industrial and scientific forces of the country is what would bring it about. It cannot come too soon. Then only will courts get true scientific opinions, and the scientific professions free themselves from the suspicion of bartering their opinions.¹

¹ Upon the subject of Expert Testimony the engineer is referred for special study to Lawson's *Expert and Opinion Evidence*, by John D. Lawson, 1883; Rogers' *Expert Testimony*, by Henry Wade Rogers, 1883; an article of interest to engineers by

Clemens Herschell, C E., in *Engineering News*, 1887, vol. 17, pp. 234 *et seq*; Inaugural Address of President Wolcott Gibbs, National Academy of Sciences, Proceedings 1896.

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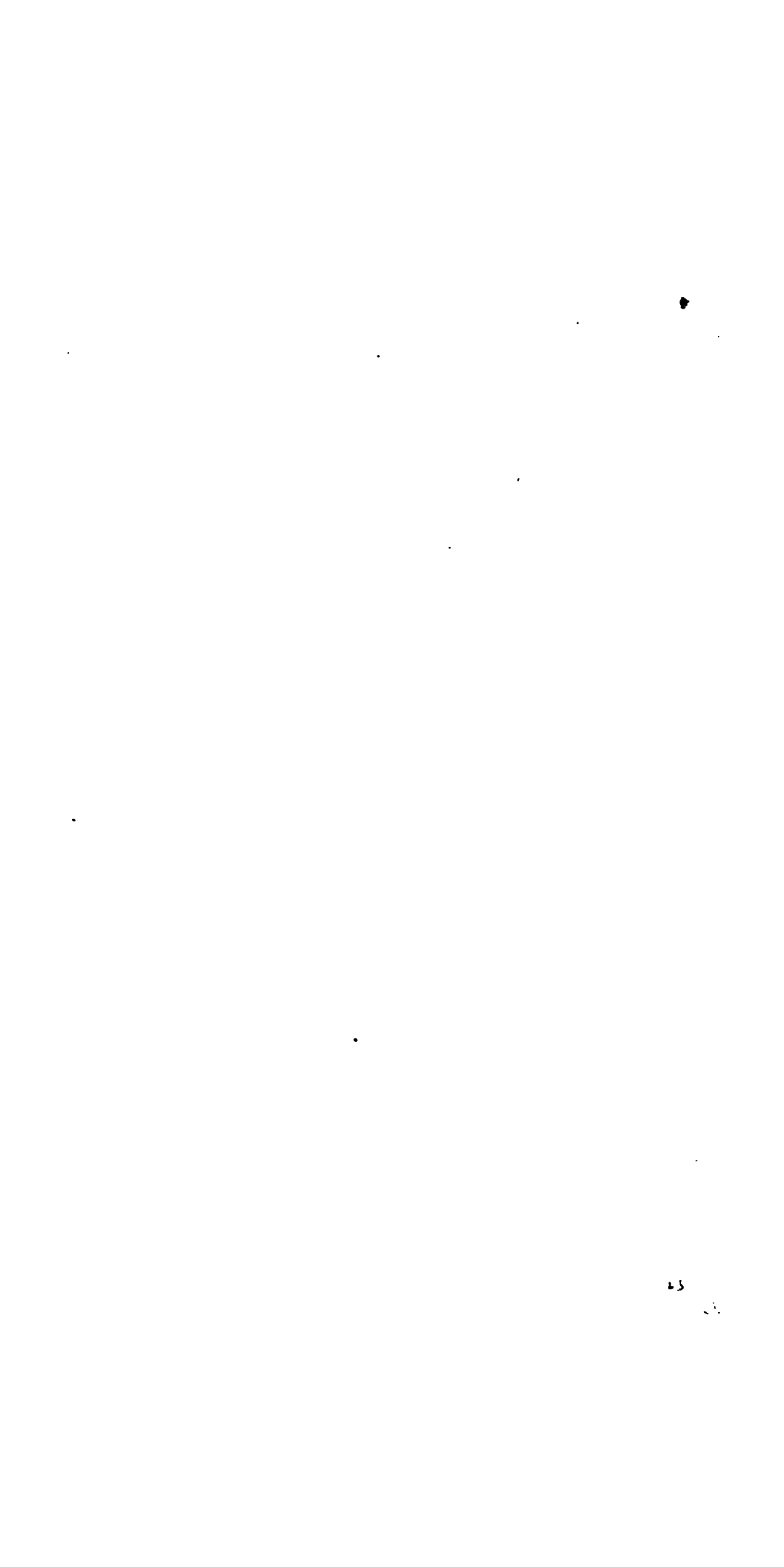
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